

1988

Department of Transportation v. Billie J. McConnell : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

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UTAH DEPARTMENT OF
TRANSPORTATION.

Appellant,

VS.

BILLIE J. MCCONNELL and the
PERSONNEL REVIEW BOARD OF THE
STATE OF UTAH,

Respondents.

Case No. 880282-CA

Argument Priority 14.a

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APPEAL OF THE FINAL DECISION OF THE UTAH PERSONNEL REVIEW BOARD,
AN ADMINISTRATIVE AGENCY OF THE STATE OF UTAH

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

STATEMENT OF JURISDICTION

Utah Code Ann. § 63–46b–16 confers jurisdiction upon the Supreme Court or other appellate court designated by statute to review all final agency actions resulting from formal adjudicative proceedings. *Utah Code Ann.* § 78–2a–3(2)(a) grants jurisdiction to the Utah Court of Appeals to review the final orders and decrees of state and local agencies.

NATURE OF PROCEEDING

This appeal is from the final decision of the Personnel Review Board, an administrative agency of the State of Utah.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented on appeal are as follows:

I. The Personnel Review Board failed to answer the dispositive issue in the case which is whether McConnell satisfied the experience requirement of the 1987 class specification of four years of professional experience.

II. The Personnel Review Board finding that the wording of the 1987 Engineering Associate III class specification did not reasonably lend itself to an interpretation different from the one applied to the 1985 class specification is in error because the face the 1987 class specification indicates that the wording of the education and experience requirements is expressly different and requires different application than that of the 1985 class specification.

III. The Personnel Review Board assumed as a fact that the UDOT interpretation of the January, 1987 class specification for the Engineering Associate III position was different and inconsistent with the Department of Personnel Management's interpretation of the class specification in spite of uncontroverted evidence that the Department of Personnel Management changed its position and supported UDOT's interpretation of the 1987 class specification's requirement mandating professional experience after its review of the matter and therefore the conclusion by the Personnel Review Board that UDOT had to give notice of such interpretation prior to its use is erroneous.

IV. The Personnel Review Board's finding that UDOT Policy No. 05–142 leads a reasonable person to conclude that the successful

passing of the Engineering Qualification Examination would result in a person's eligibility for engineering positions is in error because such finding conflicts with its own decisions and the rules of the Department of Personnel Management.

DETERMINATIVE STATUTES AND RULES

The statutes, rules and cases believed by appellant to support appellant's contentions are as follows:

Statutes

Utah Code Ann. § 67-19-13(2)

Utah Code Ann. § 63-46b-16(4) (1987).

Rules

Division of Personnel Management, Utah Department of Administrative Services, Personnel Management Rule 2.b. (1986).

Division of Personnel Management, Utah Department of Administrative Services, Personnel Management Rule 2.c. (1986).

Division of Personnel Management, Utah Department of Administrative Services, Personnel Management Rule 7.d.(2)(f) (1986).

Utah Personnel Review Board, State Employees' Grievance and Appeals Procedure, Rule 18.16.3 (1983).

Cases

Matter of Environmental Management Commission Final Order Granting A Certificate of Authority to Orange Water And Sewer Authority, 280 S.E.2d 520 (N.C.App. 1981).

Shapiro v. Kansas Public Employees Retirement Systems, Kan. 507 P.2d 281 (1973)

Gallegos v. Office of Recovery Services, Case No. 2 PRB 20 (1986).

Craythorn et al. v. Office of Community Operations, Case No. 4 PRB/H.O. 60 (1986).

Lund v. Division of Health Care Financing, Case No. 3 P.R.B. 24 (1987).

STATEMENT OF THE CASE

CASE NATURE, COURSE OF PROCEEDINGS, AND DISPOSITION

This appeal is from the final decision of the Personnel Review Board ("PRB"), an administrative agency of the State of Utah.

On July 27, 1987 McConnell filed a grievance with the Personnel Review Board hearing officer appealing a decision by the Utah Department of Transportation ("UDOT") that he did not meet the minimum qualification for an Engineering Associate III position because he did not have four years of professional experience. Hearings on the grievance were held on August 24, 1987 and September 29, 1987. The hearing officer issued a decision in the matter on October 14, 1987. UDOT appealed the decision to the PRB on January 27, 1988.

The matter was heard by the PRB on March 15, 1988 and a decision was issued on April 15, 1988. UDOT appeals from that decision.

STATEMENT OF FACTS

Introduction

The evidentiary hearing before the PRB hearing officer was held on August 24, 1987 and September 29, 1987. The proceeding before the PRB occurred on March 15, 1988. In referring to the transcript of these proceedings the format Vol. X, p. x, will be used. Vol. I is the transcript of the August 24, 1987 proceeding. Vol. II is the transcript of the September 29, 1987 proceeding. Vol. III is the transcript of the March 15, 1988 proceeding.

Facts Material to the Issues

Billie J. McConnell is an career service employee of the UDOT. (Vol. I, p. 11.) He was hired in June 1972 as a draftsman, grade 9, a technician position

in the classified service. (Vol. I, pp. 11, 12.) During the period from 1972 to 1979, he was promoted several times. (Vol. I, pp. 11–14.) Each position to which McConnell was promoted was a technician position. (Id.) As a technician, McConnell performed certain engineering functions under the supervision of professional engineers. (Vol. I, pp. 15, 30, 48, 53–56, 59, 61, 65, 68–69, 71–72, 76–78, 90–91, 94–96, 105–107, 111–115, 130–131, 134–135, 146–147.)

In August, 1979 McConnell terminated his employment to work in private industry with an engineering firm. (Vol. I, pp. 13, 14.) He worked for the firm until April, 1984 when he was rehired by UDOT as grade 18 in the technician series. (Vol. I, pp. 15, 23–24.) The work he performed in private industry was again under the supervision of licensed professional engineers and included certain engineering functions. (Vol. I, pp. 29–30.)

McConnell does not have a four year college degree in civil engineering or a related field nor does he have any graduate study in civil engineering or related fields. (Vol. I, pp. 142, 143.) In April 1987, McConnell passed the UDOT Engineering Qualification Examination (EQE). (Vol. I, p. 31.)

On May 18, 1987, UDOT advertised the position of Civil Engineer III or Engineering Associate III for District 5 located in Cedar City, Utah which is the district in which McConnell is employed. (Joint Exhibit No. 1.) This job announcement erroneously listed the minimum education and experience requirements for the Engineering Associate III position as graduation from an accredited college or university in civil engineering or closely related field, plus four years experience in a closely related field. (Id.) It advertised the substitution for the college degree as completion of the UDOT Engineering Qualification Examination plus six years related employment. (Id.)

The Engineering Associate series is a professional series of positions parallel to the Professional Engineer series. (Vol. I. p. 129–130, 136–137, 150, 152.)

The approved class specification for the Engineering Associate III, which became effective January 1, 1987, stated the minimum education and experience requirements for the position as:

(1). Graduation from an accredited 4-year college or university with major study in civil engineering or closely related professional fields, plus four (4) years professional experience.

(Grievant's Exhibit No. 4.)

The acceptable substitutions for the education and experience under the January 1, 1987 class specification on a year for year basis are:

(a) Graduate study in civil engineering or related fields for the required employment,

OR

(b) Satisfactory completion of the EQE examination plus four (4) years progressively responsible related experience for the required college degree.

(Id.)

On May 20, 1987 McConnell applied for the Associate Engineering III position advertised in the job announcement. (Stipulation of Facts, Joint Exhibits 1–5.) After filing his application McConnell became aware that he was going to be disqualified in that he did not meet the minimum experience requirement for the position and delivered a copy of his application on June 1, 1987 to the director of the Division of Personnel Management ("DPM"), for review to back up his position that he was qualified. (Utah Personnel Review Board Grievance Form, June 26, 1987, Attachment A.) (Vol. I, p. 26.)

On June 18, 1987 McConnell was notified that UDOT had determined that he did not meet the minimum experience requirement for the Engineering Associate III position. (Joint Exhibit No. 2.)

On June 19, 1987 McConnell was notified by the DPM advising him that he did meet minimum qualifications and could be considered for the position. (Joint Exhibit No. 3.)

On June 26, 1987 McConnell grieved his disqualification to Eugene Findley, director of UDOT. (Utah Personnel Review Board Grievance Form, June 26, 1987.)

On July 14, 1987 UDOT determined that McConnell did not meet minimum qualifications for the Engineering Associate III position because he did not have four years of professional experience after passing the EQE. (Joint Exhibit No. 5.)

On July 17, 1987 the DPM reversed its earlier determination and ruled that Mr. McConnell did not qualify for promotion to the Engineering Associate III position because he did not meet the minimum requirements of the position in that he lacked four years of professional experience after passing the EQE. (Joint Exhibit No. 4.)

On July 27, 1987 McConnell grieved UDOT's decision to the PRB and its hearing officer. (Personnel Review Board Grievance File.) Hearings were held on the grievance on August 24, 1987 and September 29, 1987. The hearing officer ruled on October 14, 1987 that UDOT did not give McConnell proper consideration in determining whether he met the minimum qualifications for the Engineering Associate III position and that it had violated its own personnel rule by failing to

consider him for the position. [*McConnell v. Utah Department of Transportation*, 6 PRB/H.O. 82, Findings of Fact, Conclusions of Law and Decision, p. 7 (October 14, 1987).]

On October 28, 1987 UDOT filed a Notice of Intent to File An Appeal With The Utah Personnel Review Board raising an issue of law in regard to whether the professional experience requirement of the Engineering Associate III position under the January 1, 1987 class specification is gained after one qualifies as a professional. [*McConnell v. Utah Department of Transportation*, 6 PRB/H.O. 82, Notice Of An Intent To File An Appeal With The Utah Personnel Review Board, p. 2 (October 28, 1987).]

On January 27, 1988 UDOT filed a Notice of Appeal which raised the following issues:

1. The hearing officer erred when he concluded as a matter of law that "it is clear that the existing policy at the time of the Grievant's application was to count experience previous to the E.Q.E."
2. The hearing officer erred when he concluded as a matter of law that "Department policy clearly states that the E.Q.E. exam would be administered to individuals who 'meet the minimum qualification standards.' The Grievant was given the examination and therefore must be considered as having met the minimum standards."
3. The hearing officer erred when he concluded as a matter of law that "upon successful completion of the E.Q.E., the Grievant was qualified as an applicant for the position of an Associate Engineer III position and should have been considered by the appointing authority along with other qualified applicants."

[*McConnell v. Utah Department of Transportation*, 6 PRB/H.O. 82, Notice Of Appeal, p. 2 (January 27, 1988).]

These issues were argued by UDOT in a brief it submitted to the PRB on February 4, 1988. [*McConnell v. Utah Department of Transportation*, 6 PRB/H.O. 82, Appellant's Brief, pp. 6, 17, 22 (January 27, 1988).]

On March 15, 1988 UDOT argued its brief before the PRB and focussed the arguments of the brief on resolving "...the issue in a classified merit system in which a job classification calls for a minimum requirement of professional experience, how is professional experience to be defined or interpreted?" (Vol. III, p. 4, 9–12, 12–13, 13–15.)

The PRB did not discuss the distinction between progressively responsible related experience substitution for the degree requirement and the professional experience requirement of the class specification and offered no ruling thereon. [*McConnell v. Utah Department of Transportation*, 3 PRB 26, Decision (April 15, 1988).]

SUMMARY OF ARGUMENT

Issue I. The DPM class specification for the position of Engineering Associate III has two primary minimum requirements. The first is a college degree. The second is professional experience. The class specification allows substitutions which may be relied on in lieu of the primary requirements. For the college degree an applicant may substitute four years of progressively responsible related experience. For the professional experience requirement an applicant may substitute graduate study in civil engineering or related fields. The PRB did not determine whether Mr. McConnell's experience as a technician in the classified service of the State of Utah or in the private sector qualified as professional experience which would entitle him to be considered for the position. Without having four years of professional experience Mr. McConnell does not meet the minimum qualifications for the position. He therefore cannot be considered for it. The decision of the PRB requiring UDOT to consider him for the Engineer Associate III position is therefore erroneous

Issue II. On its face the January 1, 1987 class specification for an Engineering Associate III position indicates that two primary minimum requirements exist for the position. A college degree requirement and a professional experience requirement. The language of the 1987 class specification is different from the language of the 1985 class specification and requires different application. Thus the finding by the PRB that the wording of the 1987 Engineer Associate III class specification did not reasonably lend itself to an interpretation different from the one applied to the 1985 class specification is in error.

Issue III. The PRB concluded that UDOT had to give notice of changes in interpretation of class specifications which are different from DPM's interpretation prior to the use of the interpretation. This conclusion is based on a finding of fact that the UDOT interpretation of professional experience in the 1987 class specification was different than DPM's interpretation of the 1987 class specification. The evidence shows that the DPM reversed the previous determination by its personnel analyst and agreed with UDOT that professional experience could only be accrued after obtaining professional status through professional licensure or experience in a classified professional position in the classified service.

Issue IV. Eligibility for promotions in the merit system are governed by the DPM Rule. UPMR Rule 7.d.(2)(f) provides that a merit employee must meet the minimum qualifications established by the class specification for the position to which promotion is sought. The PRB has confirmed this rule.

The PRB conclusion in this case that UDOT Policy No. 05-142 leads a reasonable person to conclude that the successful passing to the EQE would

result in a person's eligibility for engineering positions fails to take into account UPMR Rule 7.d.(2)(f) and PRB case law establishing the supremacy of the class specifications.

ARGUMENT

I. The Personnel Review Board failed to answer the dispositive issue in the case which is whether McConnell satisfied the experience requirement of the 1987 class specification of four years of professional experience.

Utah Code Ann. § 63-46b-16(4) provides:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * * *

(c) the agency has not decided all of the issues requiring resolution;

This statute confers jurisdiction on this court to provide relief in this instance if the appellant can show (1) it has been substantially prejudiced by (2) the agency having not decided all of the issues requiring resolution.

The issue which the PRB did not decide is whether McConnell met the minimum qualifications ("MQs") for the Engineering Associate III position. This issue is dispositive since a ruling that MQs were met would result in UDOT having improperly denied McConnell consideration to which he was entitled. On the other hand if it ruled that the MQs had not been met UDOT would have acted properly in denying his application for the position.

Before the PRB could decide whether McConnell had met the MQs it had to decide whether the experience he had accrued in the technician series positions and his experience in the private sector under the supervision of licensed

professional engineers constituted "professional experience" since the Associate Engineer III class specification in effect on January 1, 1987 requires "four years professional experience in addition to a college degree. These are the primary MQs.

The rules governing the promotion of merit employees are found in the State of Utah Personnel Management Rules ("UPMR") promulgated by the DPM, and in the decisions of the Utah PRB.

Promotions by agencies of its employees are governed by UPMR Rule 2.c. which states:

Individuals are employed by the State of Utah but directed in their assignments by agencies, which agencies have the responsibility to manage their own human resources in compliance with these rules, reserving the ability and authority to correct administrative errors.

The applicable rule which an agency must comply with when it promotes its career service employees is UPMR Rule 7.d.(2)(f) which provides:

To be eligible for career service promotion, an employee must meet the minimum qualifications specified in the class specification for the position and must have received a standard or higher performance rating within the last twelve months.

The PRB applied Rule 7.d.(2)(f) in *Gallegos v. Office of Recovery Services*, Case No. 2 PRB 20 (1986). The case involved a claim by an employee of the Department of Social Services that she qualified for a promotion under a job announcement which was inconsistent with the class specification for the announced position. Gallegos claimed that the job announcement controlled as to the issue of minimum requirements of education and experience not the DPM approved class specification. She further claimed that her prior experience

qualified as "professional related employment" experience under the class specification and therefore she was "unjustly denied a promotion."

On the issue of whether a job announcement controls the setting of minimum requirements for a position in a class series the PRB said:

However, Personnel Management Rules and Regulations (1985 ed.), Rule 7.d.(2)(e), [7.d.(2)(f)(1986)] establishes the supremacy of classification specifications ("class specs") over job announcements in the promotion of career service employees. Such employees must meet the minimum qualifications set forth in the class specs. That provision takes precedence over job announcements, particularly if the latter happen to be inaccurate or out-dated (emphasis added).

Gallegos at pp. 9, 10.

In reviewing Gallegos' appeal of whether her experience qualified her under the class specification the PRB held:

In sum, DPM Rule 2.c. empowers the employing agencies to "manage their own human resources" under the aegis of DPM rules and statutory parameters. Employing agencies are to function with reasonable managerial discretion, such as that regarding the assessment of whether their employees meet promotion requirements. The grievance procedure serves as a conditional check on any abuse of that discretion.

Gallegos at p. 8.

In *Craythorn et al. v. Office of Community Operations*, Case No. 4 PRB/H.O. 60 (1986) the PRB hearing officer had to determine whether the performance of duties assigned to a higher grade in the classified series by an employee employed in a position classified at a lower grade level in the classified series could be applied toward the education and experience requirements for a promotion to the higher grade. The hearing officer held:

Since neither of the grievants has the requisite work experience at Grade 15, each contends that her work at another lower level is "equivalent" to Grade 15, in terms of duties and supervision level and should be counted. Specifically, Ms. Craythorn contends that she has been performing the equivalent duties of Records Management level II work since August 22, 1981 and, thus, she meets the minimum qualifications under the job specification of an Intake II (Grade 17) for substitution on a year-for-year basis for the bachelor's degree as of August 23, 1985. She was, however, in a position classified as a Grade 13 between August 22, 1981 and December 10, 1983. Ms. Evans contends that she has been performing the equivalent duties of Records Management level II work since October, 1981 and, thus, she meets the minimum qualifications under the job specifications of an Intake II (Grade 17) for substitution of a year-for-year basis as of October, 1985. She was, however, in a position classified as Grade 11-13 between October, 1981 and April, 1983. (Emphasis added.)

The Hearing Officer finds that the Agency acted reasonably in requiring that the four years of work experience be at a Grade 15 level and that the experience at less than a Grade 15 level not be considered in the determination of the minimum qualifications for the position.

The class specification system should be respected; it impacts many employees and is necessary for the smooth operation of the agencies using it. Its integrity can be enhanced by allowing it to operate as it was designed to. The proper person to determine "equivalency" of jobs is a person specially trained to make that determination. In this instance, the personnel classification specialist found that "equivalency" meant job experience at Grade 15 level because of the complexity of experience required at that level. Based upon the evidence presented, the Hearing Officer determines that the specialist acted reasonably and rationally and that the promotions were properly denied by the agency (emphasis added).

Craythorn at pp. 7, 8. Neither Craythorn nor Evans appealed the decision of the hearing officer to the PRB. Pursuant to Utah Personnel Review Board, State

Employees' Grievance and Appeals Procedure, Rule 18.16.3 (1983) the hearing officer's decision and order becomes the decision and order of the PRB unless appealed.

The McConnell case involves many of the same facts and legal issues resolved in the above two cases. The job bulletin erroneously listed the educational and experience requirements for the Engineering Associate III position as graduation from an accredited college or university in civil engineering or closely related field, plus four years experience in a closely related field or substitution for the college degree by completion of the UDOT Engineering Qualification Examination plus six years related employment. (Joint Exhibit No. 1.)

The January 1, 1987 class specification for the Engineering Associate III requires graduation from an accredited college or university in civil engineering or closely related field, plus four years professional experience with substitutions available for the college degree and professional experience. (Grievant's Exhibit No. 4.) The substitution for the college degree is satisfactory completion of the EQE examination plus four years of progressively responsible related experience. (Grievant's Exhibit No. 4.) The substitution for the professional experience was graduate study in civil engineering or related fields. (Grievant's Exhibit No. 4.) Because of the conflict between the job announcement bulletin and the DPM class specification McConnell can qualify only under the class specification. *Gallegos* at pp. 9, 10.

McConnell did not have a college degree and must use the EQE plus four years of his technician class series experience as a substitution for the degree. (Vol. I, pp. 142, 143.) (Vol. I, p. 31.) UDOT qualified him in regard to the

college degree requirement by substitution. (Vol. I, p. 95) McConnell did not have graduate study in civil engineering or related fields so the substitution for the four years of professional experience is not available. (Vol. I, pp. 142, 143.) His case must, therefore, rise and fall on whether he has four years of "professional experience".

McConnell argues that during his private employment from August, 1979 to April, 1984 and his employment with the state in the technician class series from June, 1972 to August, 1979 and April, 84 to May, 87 he performed engineering work and functions which the professional and associate engineers class series performed and therefore he had at least four years of "professional experience".

UDOT maintains that McConnell qualified for the professional class series by passing the E.Q.E. in April, 1987 with four years of progressively responsible related experience in the technician class series and qualified for promotion to an entry level position in the professional series which required no professional experience. He could only start accruing "professional experience" by working in the professional class series or as a licensed professional engineer. Because all of his experience accrued in the technician class series prior to passing the E.Q.E. it would not qualify as "professional experience". Furthermore, the private experience was accrued not as a professional engineer and therefore would not qualify as professional experience.

The *Craythorn* and *Gallegos* cases answer McConnell's argument. *Craythorn* stands for the rule that in a statutory classification and merit system experience gained in performing the functions of a particular position within a class

series will be evaluated under the parameters of the class specification not the subjective evaluation of an employee. Therefore, work performed within a particular grade will be deemed to be work of that grade even if the work involves some functions of a higher grade. As the hearing officer said, "The proper person to determine "equivalency" of jobs is a person specially trained to make that determination." *Craythorn* at pp. 7, 8. The evaluation of whether an employee meets the requirements of a particular class specification is a matter of agency discretion. *Gallegos* at p. 8.

UDOT explained why the class specification was changed, effective January 1, 1987. Grant Fairbanks, the personnel manager, which is a position of special training in personnel matters, said:

MR. FAIRBANKS: Well, I want to present this separately. So I will say that during this time there were some changes, and there was a specification, which is the specification that he -- that he has referred to, and we use that. It was called to my attention that in using that specification that was a very broad interpretation because of the last section where it did not differentiate between the two types of experience, one experience prior to qualifying as an engineer and the other experience after qualifying for an engineer. And so recognizing that, we saw a need to change the specification so that it would be clearer to everyone that there were two definite types of experience -- experience gained to satisfy the college -- the substitution for the college degree and the experience required for -- as an engineer to qualify for the Level III. This makes it consistent with the requirements of the Board of Registration, which I will explain in a few minutes.

MR. DAVIES: When you say "this," what are you referring to?

MR. FAIRBANKS: The new spec makes it consistent separating those two types of experience, the experience substituting for college and then the

experience necessary above the college level. And it makes it consistent with the requirements of a Professional Engineer, which we are attempting to do with this, and I will make that known in my presentation (emphasis added).

(Vol. I, pp. 90–92, 98–101.)

Marvin Johnson, the manager of the Classification and Compensation Bureau of DPM, another trained personnel specialist, testified as to the reasons for the change in the class specification for Engineering Associate III. He said:

Q. Do you know what the need for the change was?

A. It was -- one reason was we had identified a change in the minimum qualifications changing those from civil engineering degree plus six years of experience. We changed that to four years of experience with the specs that we were working with that job analysis for the division method. An Jerry pointed that out and asked if he could go ahead and start looking at all this. And I said yes, he could go ahead and do all that since it applies specifically only to title.

Q. As far as you were concerned, there was only lowering total years of experience?

A. He also talked about changes in the way they were interpreting the minimum qualifications (emphasis added).

(Vol. I, pp. 118, 119.)

Felix McGowan, manager of the Staffing & Employee Services Bureau of DPM, another trained personnel specialist, testified as to why the UDOT interpretation was the correct interpretation of the class specification. He said:

Afterwards, after talking with the subject matter experts and in thorough discussion with the licensing representative from the Department of Business Regulation and understanding that it was the Department's philosophy and practice to count only the post experience, then I basically had no choice but to

basically overturn the decision and agree that the post experience is what is considered as qualifying and consistent with the Business Regulation licensure practice.

(Vol. I, p. 131.)

This evidence establishes the reasons for the change in the class specification and interpretation by UDOT of the education and experience requirements of the class specifications. As the PRB has held, the evaluation by agencies of employee qualifications is discretionary and to be proper must be based in reason. *Gallegos* at p. 8. UDOT was merely applying the class specification and its education and experience requirements to McConnell. In doing so it had to determine whether his experience in the private sector and in the technician class series qualified as "professional experience." It decided that the technician experience was not professional experience and that the private experience was not professional experience because none of it had accrued prior to his qualifying as a professional in the professional class series or as a licensed professional engineer.

The discretionary interpretation of the language of the new class specification was consistent with its purpose. In such case discretion is management's prerogative so long as there is present some reasonable basis for the exercise of the discretion. *Lund vs. Division of Health Care Financing*, Case No. 3 PRB 24 (1987), p. 8.

The PRB failed to decide this issue which was the threshold question that had to be answered before it could address the other issues on appeal before it. This failure to decide the dispositive issue resulted in the making of an erroneous decision by the board.

The making of an erroneous decision by the board constitutes substantial prejudice to the agency because it requires the agency to now consider an employee who does not satisfy the class specifications for the position. The decision interferes with a discretionary decision UDOT is entitled to make.

II. The Personnel Review Board finding that the wording of the 1987 Engineering Associate III class specification did not reasonably lend itself to an interpretation different from the one applied to the 1985 class specification is in error because the face of the 1987 class specification indicates that the wording of the education and experience requirements is clearly different and requires different application than that of the 1985 class specification.

Utah Code Ann. § 63-46b-16(4) provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * * *

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

The Utah Administrative Practices Act establishes the standard for the appellate review of agency action is to be one based on the whole record. *Utah Code Ann. § 63-46b-16(4)*. Under this standard the reviewing court must consider the complete record. It may not consider evidence which in and of itself justifies the agency action without taking into account evidence from which conflicting inferences can be drawn or which contradict the agency action. *Matter of Environmental Management Commission*, 280 S.E.2d 520, 528 (N.C.App. 1981).

Under this standard the court must review the entire record and determine whether following finding of fact made by the PRB in its decision of April 15, 1988 is supported by the whole record:

8. The wording of the 1987 class spec does not reasonably lend itself to an interpretation different from the one applied to the 1985 class spec, which accepted related job experience before the E.Q.E., pursuant to the substitution provision of (2)(b).

McConnell v. Utah Department of Transportation, 3 PRB 26, Decision, p. 6 (April 15, 1988).

The 1985 class specification referred to by the PRB states the education and experience qualifications for the Engineering Associate III position as:

B. Education and Experience

(1) Graduation from an accredited 4-year college or university with major study in civil engineering or closely related fields, plus six (6) years experience in a closely related field,

OR

(2) Substitutions on a year-for-year basis as follows:

Satisfactory completion of the UDOT Engineer Qualification Examination plus eight (8) years experience in a related field or an equivalent combination of education and progressively responsible full-time paid employment in a closely related field.

(Grievant's Exhibit 4.)

The 1987 class specification states the education and experience qualifications for the Engineering Associate III position as:

B. Education and Experience

(1) Graduation from an accredited 4-year college or university with major study in civil engineering or closely related professional fields, plus four (4) years professional experience.

OR

(2) Substitutions on a year-for year basis as follows:

(a) Graduate study in civil engineering or related fields for the required employment,

OR

(b) Satisfactory completion of the EQE examination plus four (4) years progressively responsible related experience for the required college degree.

(Grievant's Exhibit 5.)

On its face the 1987 class specification expressly requires four years of professional experience. The 1985 class specification requires six years of experience in a closely related field. The 1985 class specification allows an applicant to substitute either satisfactory completion of the EQE plus eight years of experience in a related field or an equivalent combination of education and progressively responsible full-time paid employment in a closely related field for both the education and experience requirements. For UDOT employees the EQE satisfies the college degree requirement. The 1987 class specification allows an applicant to substitute 4 years of graduate study in civil engineering or related fields for the four years of professional experience and satisfactory completion of the EQE and four years of progressively responsible related experience for the college degree. The 1985 class specification has no language, express or implied, which requires professional experience while the 1987 class specification expressly requires four years of professional experience which can be satisfied by four years of graduate study in civil engineering or related fields.

Because the 1987 class specification expressly requires four years of professional experience while the 1985 class specification requires no professional experience the two documents are on their face different from each other. Each

must be interpreted differently and independent of each other. An interpretation of the 1985 class specification can not be applied to the 1987 class specification which is different from it. To do so is a substantial error which resulted in an erroneous finding.

This erroneous finding was the basis from which the legal conclusion was drawn that McConnell was qualified to be considered for the Engineering Associate III position and that any change in interpretation of class specifications which is different from DPM's interpretation must be announced to applicants in the job announcement. [*McConnell v. Utah Department of Transportation*, 3 PRB 26, Decision, p. 8, 13 (April 15, 1988).] [*McConnell v. Utah Department of Transportation*, 6 PRB/H.O. 82, Findings of Fact, Conclusions of Law and Decision, pp. 5-7 (October 14, 1987).]

An erroneous finding of fact and conclusion of law is a gross mistake of fact and mistaken application of law which constitutes substantial prejudice to the agency which must be remedied by the court. *Shapiro v. Kansas Public Employees Retirement System*, Kan., 507 P.2d 281, 287-8 (1973).

III. The Personnel Review Board assumed as a fact that the UDOT interpretation of the January, 1987 class specification for the Engineering Associate III position was different and inconsistent with the Department of Personnel Management's interpretation of the class specification in spite of uncontroverted evidence that the Department of Personnel Management changed its position and supported UDOT's interpretation of the 1987 class specification requirement mandating professional experience after its review of the matter and therefore the conclusion by the Personnel Review Board that UDOT had to give notice of such interpretation prior to its use is erroneous.

Utah Code Ann. § 63-46b-16(4) provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * * *

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

Under the whole record standard the court must review the entire record and determine whether the following finding of fact made by the PRB in its decision of April 15, 1988 is supported by the whole record:

15. There is no obligation by a State agency to further define a class spec issued by DPM with a new interpretation; but if an agency chooses to do so, then the burden is on that agency to be consistent with DPM's interpretation. Thus, agencies have some measure of discretion and latitude to interpret the class specs differently from DPM, but if agencies choose to interpret them differently then the burden is on those agencies, such as UDOT, to show consistency and clarity, but absent on (sic) abuse of discretion. Even so, appeals from an agency's distinguishing interpretation may be taken to this Board, if not previously rectified by DPM.

[*McConnell v. Utah Department of Transportation*, 3 PRB 26, Decision, p. 7 (April 15, 1988).]

This finding of fact must be based on evidence which establishes that UDOT's interpretation of the 1987 class specification was different than DPM's interpretation. The evidence in the record that would presumably support such a finding is the testimony offered by Marvin Johnson (Vol. I, pp. 116–120), Alberta Archuleta (Vol. I, pp. 121–125), Felix McGowan (Vol. I, pp. 126–145), Grievant's Exhibit #4, and Grievant's Exhibit #5.

However, this evidence establishes that Ms. Archuleta, a personnel analyst in DPM, was assigned to review Mr. McConnell's qualifications after he

complained to DPM that UDOT had determined that he did not meet the MQs for the Engineering Associate III position. (Vol. I, pp. 121–125.) She reviewed his resume and determined that he did meet the MQs for the position. (Vol. I, p. 122.) When UDOT was informed of the determination it contacted Felix McGowan, manager of the DPM Employee Staffing and Employee Services Bureau. (Vol. I, p. 126.) Mr. McGowan reviewed Ms. Archuleta's determination and reversed her decision. (Stipulation of Facts, Joint Exhibit # 1–5.) (Vol. I, p. 131.) DPM agreed with UDOT's interpretation of the class specification requirement for professional experience. (Stipulation of Facts, Joint Exhibit # 1–5.) (Vol. I, p. 131.) (Joint Exhibit #4.) Mr. McGowan testified that Mr. McConnell's interpretation of the 1987 class specification was incorrect. (Vol. I, pp. 141–144.)

The only reasonable conclusion which can be drawn from this evidence is that DPM agreed with UDOT's interpretation of the 1987 class specification because Ms. Archuleta's decision was reversed by on appeal by UDOT. A conclusion to the contrary could be drawn only if this evidence was not considered. If DPM was in agreement with UDOT's interpretation of the 1987 class specification then McConnell did not meet the MQs for the Engineering Associate III position and UDOT was correct in so advising him.

The PRB entered a finding of fact which was a gross mistake of fact and misapplied such fact in reaching the conclusion of law that UDOT and DPM interpreted the class specification differently. Such error was prejudicial to UDOT and was a substantial error.

IV. The Personnel Review Board's finding that UDOT Policy No. 05–142 leads a reasonable person to conclude that the successful passing of the Engineering Qualification Examination would result in a person's eligibility for engineering

positions is in error because such finding conflicts with its own decisions and the rules of the Department of Personnel Management.

Utah Code Ann. § 63-46b-16(4)(h)(iii) provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * * *

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

The PRB made the following finding of fact:

14. UDOT policy 05-142 states in part:

A passing score on this examination (E.Q.E.) does not guarantee promotion to engineering status but will establish an individual's eligibility (sic) for engineering positions as they become available. (Emphasis added.)

A plain reading of the above-quoted provision would lead a reasonable person to conclude that successfully passing of the E.Q.E. would establish a person's eligibility for engineering positions. The Agency's 1987 interpretation of the subject class spec would appear to be in conflict -- if not a contradiction -- with the above-cited policy.

McConnell v. Utah Department of Transportation, 3 PRB 26, Decision, p. 7 (April 15, 1988).

This finding of fact is in conflict with the DPM rule governing promotions. UPMR Rule 7.d.(2)(f) establishes the class specification as the controlling document in determining qualification for promotions for career service employees as the discussion in Issue I indicates. Furthermore, DPM is given authority under Utah Code Ann. § 67-19-13(2) to approve all personnel actions.

DPM has confirmed this authority in UPMR Rule 2.b.(4) and 2.c.(3). No promotion will be granted unless the MQs, as set forth in the class specification for the position, are met. The *Gallegos* case discussed in Issue I is further support for this position.

In McConnell's case the PRB found that UDOT was in violation of policy no. 05-142 because under it a reasonable person would conclude that passing the E.Q.E would establish eligibility for promotion to engineering positions. [*McConnell v. Utah Department of Transportation*, 3 PRB 26, Decision, p. 7 (April 15, 1988).] Under the PRB finding the policy determines an applicant's eligibility. UDOT's interpretation of the 1987 class specification contradicts the policy. [*Id.*]

The problem with this finding is that UDOT policy no. 5-142 is in harmony with the DPM rule. UDOT maintains that passing the E.Q.E puts the applicant on the in-house register from which promotions will be made. To be promoted to the Engineering Associate III position applicants from the register created under the policy must meet the MQs of the class specification. Upon meeting the MQs of the class specification the applicant will be promoted to the position. UDOT's interpretation of the class specification is that it requires four years of professional experience which is experience which is obtained in a professional grade or as a licensed engineer. McConnell did not have such professional experience and therefore did not qualify under the January 1, 1987 class specification.

The PRB finding discounts the supremacy of the class specification. It would allow an employee to merely pass the E.Q.E. which would entitle him to be promoted to any engineering position within the professional class series. It is

conceivable that a technician could, under the PRB finding, become a supervising engineer which is the highest level in the series without any experience as a supervisor because all he or she would have to do is pass the E.Q.E. and demonstrate the requisite number of years of experience in a related field in progressively responsible work. This position totally disregards the primary MQ of "four (4) years of professional experience" in the 1987 class specification.

This position is in direct conflict with the previous PRB decision in *Gallegos* and with UPMR Rule 7.d.(2)(f) which establishes that the class specification is the source of all minimum qualifications for positions which must be met by an applicant.

The PRB failed to consider UPMR Rule 7.d.(2)(f) and its own case law interpreting the rule and to apply the rule and case law in reaching this finding. Because the PRB failed to consider and apply the DPM rule and its case law the finding is not supported by substantial evidence in the record and is therefore erroneous.

CONCLUSION

I. The Personnel Review Board failed to answer the dispositive issue in the case which is whether McConnell satisfied the experience requirement of the 1987 class specification of four years of professional experience

II. The Personnel Review Board finding that the wording of the 1987 Engineering Associate III class specification did not reasonably lend itself to an interpretation different from the one applied to the 1985 class specification is in error because the face of the 1987 class specification indicates that the wording of the education and experience requirements is expressly different and requires different application than that of the 1985 class specification.

III. The Personnel Review Board assumed as a fact that the UDOT interpretation of the January, 1987 class specification for the Engineering Associate III position was different and inconsistent with the Department of Personnel Management's interpretation of the class specification in spite of uncontroverted evidence that the Department of Personnel Management changed its position and supported UDOT's interpretation of the 1987 class specification requirement mandating professional experience after its review of the matter and therefore the conclusion by the Personnel Review Board that UDOT had to give notice of such interpretation prior to its use is erroneous.

IV. The Personnel Review Board's finding that UDOT Policy No. 05-142 leads a reasonable person to conclude that the successful passing of the Engineering Qualification Examination would result in a person's eligibility for engineering positions is in error because such finding conflicts with its own decisions and the rules of the Department of Personnel Management.

DATED this 21st of November, 1988.

DAVID L. WILKINSON
Attorney General

By NEAL T. GOOCH
NEAL T. GOOCH
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, on this 25th day of November, 1988, to:

L. Zane Gill
Adamson, Clark & Gill
Attorneys for Respondent
Suite 255
Atrium Building
5250 South 300 West
Salt Lake City, Utah 84107
Telephone: (801) 328-1666

Walt T. Bonck

ADDENDUM

Grievant's Exhibit No. 4

Grievant's Exhibit No. 5

Stipulated Facts, Joint Exhibits 1–5

Utah Code Ann. § 67–19–13(2)

Utah Code Ann. § 63–46b–16(4) (1987).

Division of Personnel Management, Utah Department of Administrative Services, Personnel Management Rule 2.b. (1986).

Division of Personnel Management, Utah Department of Administrative Services, Personnel Management Rule 2.c. (1986).

Division of Personnel Management, Utah Department of Administrative Services, Personnel Management Rule 7.d.(2)(f) (1986).

Utah Personnel Review Board, State Employees' Grievance and Appeals Procedure, Rule 18.16.3 (1983).

Gallegos v. Office of Recovery Services, Case No. 2 PRB 20 (1986).

Craythorn et al. v. Office of Community Operations, Case No. 4 PRB/H.O. 60 (1986).

Lund v. Division of Health Care Financing, Case No. 3 P.R.B. 24 (1987).

McConnell v. Utah Department of Transportation, 6 PRB/H.O. 82, Findings of Fact, Conclusions of Law and Decision, p. 7 (October 14, 1987).

McConnell v. Utah Department of Transportation, 3 PRB 26, Decision (April 15, 1988).

UDOT Policy No. 05–142.

GRIEVANT'S EXHIBIT No. 4

STATE OF UTAH - DIVISION OF PERSONNEL MANAGEMENT
APPROVED CLASS SPECIFICATION

I. Class Title: Engineering Associate III Salary Range: 17-12 Class Code: 5026 Effective Date: 410-16-83 OT Code: E EEO Code: 2

II. Distinguishing Characteristics:

This is a supervisory level class with a probationary period of six (6) months. Incumbents in this class utilize advanced training, experience and independent judgment in the evaluation and modification of complex engineering situations requiring specialized abilities.

III. Examples of Work: (These are intended as general illustrations of the work in this class and are not all inclusive for specific positions)

Schedules, conducts or coordinates detailed phases of the engineering work; acts as a project engineer exercising independent judgment in work of a conventional engineering nature, but which involves various solutions or applications, conflicting requirements, unsuitability of material or difficult coordination requirements; engineering functions may include duties at district and central office areas involving design, project development, location, maintenance, materials, right-of-way, environmental studies, highway use, hydraulics, field office, planning and programming, project construction, research, structures, traffic studies and transportation planning, performs other related duties as assigned.

IV. Qualifications Statement

A. Knowledge, Skills, and Abilities:

Knowledge of:

Principles and practices of civil engineering relating to the design, construction and maintenance of transportation systems;

Pertinent laws, rules and regulations

Ability to:

Coordinate and supervise the activities of other engineers and technicians

Apply policies and procedures relating to EEO practices

Communicate effectively in both oral and written form

B. Education and Experience

- (1) Graduation from an accredited 4-year college or university with major study in civil engineering or closely related fields, plus six (6) years experience in a closely related field,

OR

(2) Substitutions on a year-for-year basis as follows:

- (a) Satisfactory completion of the UDOT Engineer Qualification Examination plus eight (8) years experience in a related field or an equivalent combination of education and progressively responsible full-time paid employment in a closely related field.

*For internal promotions, employees of UDOT may pass the UDOT Engineering Qualification Exam in lieu of a college degree.

GRIEVANT'S EXHIBIT No. 5

STATE OF UTAH - DIVISION OF PERSONNEL MANAGEMENT
APPROVED CLASS SPECIFICATION

- I. Class Title: Engineering Associate III Salary Range: 27-12 Class Code: 5026 Effective Date: 1-1-87 UT Code: E EEO Code: 2

II. Distinguishing Characteristics:

This is a supervisory level class with a probationary period of six (6) months. Incumbents in this class utilize advanced training, experience and independent judgment in the evaluation and modification of complex engineering situations requiring specialized abilities.

- III. Examples of Work: (These are intended as general illustrations of the work in this class and are not all inclusive for specific positions)

Schedules, conducts or coordinates detailed phases of the engineering work; acts as a project engineer exercising independent judgment in work of a conventional engineering nature, but which involves various solutions or applications, conflicting requirements, unsuitability of material or difficult coordination requirements; engineering functions may include duties at district and central office areas involving design, project development, location, maintenance, materials, right-of-way, environmental studies, highway use, hydraulics, field office, planning and programming, project construction, research, structures, traffic studies and transportation planning, performs other related duties as assigned.

IV. Qualifications Statement

A. Knowledge, Skills, and Abilities:

Knowledge of:

Principles and practices of civil engineering relating to the design, construction and maintenance of transportation systems;

Pertinent laws, rules and regulations

Ability to:

Coordinate and supervise the activities of other engineers and technicians

Apply policies and procedures relating to EEO practices

Communicate effectively in both oral and written form

B. Education and Experience

- (1) Graduation from an accredited 4-year college or university with major study in civil engineering or closely related professional field, plus four (4) years professional experience.

OK

(2) Substitutions on a year-for-year basis as follows:

- (a) Graduate study in civil engineering or related fields for the required employment,

OK

- (b) Satisfactory completion of the EOE examination plus four (4) years progressively responsible related experience for the required college degree.

STIPULATED FACTS, JOINT EXHIBITS 1 - 5

STIPULATION OF FACTS

On May 20, 1987, Billie J. McConnel applied for an Engineering Associate III position as advertised on UDOT's Advertising Bulletin #18. (Joint Exhibit #1)

On June 15, 1987, Alfredo LeBlanc, a Personnel Analyst in the UDOT Human Resources Division sends notification to grievant informing him he does not meet minimum qualifications. (See Joint Exhibit #2)

On June 18, 1987, Alberta Archuleta, a Personnel Analyst for the Department of Personnel Management reviewed grievant's application and concluded that he met minimum qualifications for the position (without benefit of subject matter experts). (See Joint Exhibit #3)

On July 17, 1987, Felix McGowan, Bureau Manager in the Department of Personnel Management reversed his Department's earlier decision and found grievant did not meet minimum qualifications for the Engineering Associate III position. (See Joint Exhibit #4)

The specific reason for disqualifying grievant from application was the joint interpretation by DPM and UDOT officials that "...experience prior to being qualified as an engineer cannot be counted as engineering experience.) (See Joint Exhibit #5)

Job # Exhibit

|

18

AVAILABLE POSITION

May 18, 1987

The position, CIVIL ENGINEER III or ENGINEERING ASSOCIATE III is available in District Five, Cedar City District Headquarters. This is an interim position which may be abolished at a later date resulting in the successful applicant returning to the same status and salary he/she previously held prior to receiving the appointment. Salary increase for promotion will not be available until July 1, 1987. Career Board will be interviewing.

EXPERIENCE AND EDUCATIONAL REQUIREMENTS:

Schedules, conducts or coordinates detailed phases of the engineering work; acts as a project engineer exercising independent judgement in work of a conventional engineering nature, but which involves various solutions or applications, conflicting requirements, unsuitability of material or difficult coordination requirements; engineering functions may include duties at district and central office areas involving design, project development, location, maintenance, materials, right-of-way, environmental studies, highway use, hydraulics, field office, planning and programming, project construction, research, structures, traffic studies and transportation planning, performs other related duties as assigned.

EXPERIENCE AND EDUCATIONAL REQUIREMENTS:

Must be a registered Professional Engineer in accordance with Utah Code 56-22, as annotated.

IF FILLED AS A ENGINEERING ASSOCIATE III

Graduation from an accredited four year college or university with major study in civil engineering or a closely related field, plus four (4) years experience in a closely related field;

OR

Substitutions on a year-for-year basis as follows:

Graduate study in Civil Engineering or related fields for the required employment

OR

Satisfactory completion of the EIT examination plus four years related employment for the required college degree,

OR

Satisfactory completion of the UDOT Engineering Qualification Examination plus six (6) years related employment for the required college degree.

Applicants for this position must be UDOT career service employees. Interested applicants should contact the Human Resource Section - phone 965-4249 and submit two current applications to Personnel, 4501 South 2700 West, Salt Lake City, Utah 84119, no later than 5:00 p.m. on the closing date of May 27, 1987* (see other side). This position will be filled on an equal employment opportunity basis.

ELVA M. ANDERSON
SECRETARY



Assistant Director
Gene Sturzenegger, P.E.

4501 South 2700 West
Salt Lake City, Utah 84119

John T
Exhibit
#2

Dear Mr. McConnell:

_____ Your training and/or experience is not sufficiently related for this position.

_____ You do not have the minimum training experience required to qualify for this position.

_____ You do not have the minimum employment experience required to qualify for this position.

_____ This position is open only to current career service status employees of the Department of Transportation.

_____ This position is open only to current career service status employees of the State of Utah.

_____ Your application was received after the closing date and cannot be considered.

X Other - Career Board has reviewed your application and the documents, at this time you do not meet the minimum qualifications for the Engineer Associate III (Grade 27) position for which you have applied.

Sincerely,

Alfredo A. LeBlanc
Personnel Analyst

Received
6-18-57
L. J. [unclear]



STATE OF UTAH
Department of Administrative Services
Division of Personnel Management

Norman H. Bangert, Governor
Brian E. Harris, Director

MEMORANDUM

Joint
Exhibit

TO: Steve Nobel, U.D.O.T Director, District Five

FROM: Brian E. Harris, *BEH* Director
Division of Personnel Management

DATE: June 17, 1987

SUBJECT: Application Review

II 3

done by
archivist

The Division of Personnel Management upon review and evaluation of Billie J. McConnel's application for Engineering Associate III, District 5, find that he does meet the minimum qualifications and may be considered along with other qualified applicants for that position.

BEH/AA/rvp

cc: Grant Fairbanks, U.D.O.T Personnel Manager
Billie J. McConnel, applicant
Central File

Received
June 19, 1987
Jim McConnel

26481



State of Utah
Department of Administrative Services
Division of Personnel Management

Norman H. Bangerter, Governor
Brian E. Harris, Director

John +
Exhibits
4

MEMORANDUM

TO: Grant Fairbanks, Personnel Manager
Utah Department of Transportation

FROM: Felix J. McGowan, ^{FJM}Bureau Manager
Division of Personnel Management

DATE: July 17, 1987

SUBJECT: Qualification for Engineering Associate III - Billie J. McConnell

Regarding the question of Mr. McConnell's qualifications for Engineering Associate III, it was DPM's initial determination that the employee qualified for promotion based on our interpretation of the job requirements.

After further discussion with subject matter experts who provided additional job related interpretations of need qualification factors and criteria, DPM must now reverse its initial decision; therefore, agreeing with the department's opinion that Mr. McConnell does not qualify for promotion to the Engineering Associate III position.

Please notify the employee (applicant) regarding this decision.

FJM/rvp

cc: Brian E. Harris
John Mathews
Alberta Archuleta
Ken Wilks
Central File Staffing

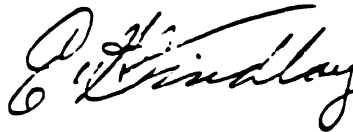
Memorandum

UTAH DEPARTMENT OF TRANSPORTATION

DATE: July 14, 1967

TO : B.J. McConnell, Estimates & Agreements Specialist

FROM : E.H. Findlay, CPA, Director



SUBJECT: Grievance

I have reviewed your appeal to the decision that was made indicating that you did not meet the minimum qualifications for an Engineering Associate III.

The matter has been discussed in detail with our Human Resource Staff, the State Division of Personnel Management and two professional engineers serving on the Department's Career Board. It is the contention of the Department that experience prior to being qualified as an engineer cannot be counted as engineering experience. Your qualifications in performing engineering functions were verified to the Department through passing the Engineering Qualification Examination this year. These qualifications could have also been obtained through college graduation in engineering or passing the Engineer-in-Training exam. Experience gained in engineering functions after that time could be considered in meeting the experience requirements of the Engineering Associate III position.

Policy 05-142 does indicate that by successfully passing the Engineering Qualification Exam, a person would be eligible for engineering status. The first engineering level does not have an experience requirement; however, the higher levels do have an experience requirement above the passing of the UDOT Engineering Qualification Exam as indicated by the specifications. This policy, 0-142, does not do away with that experience requirement.

Policy 01-8 states that "selection and placement procedures, within the provisions of the Merit System, shall be utilized..." It should be noted that meeting minimum qualifications are part of that system.

Your other references to UDOT policies have been noted; however, those policies do not supersede the need to meet minimum specifications.

Join T

Exhibit

5

Received 7-17-67
Jim McConnell

Utah Code Ann. Section 67-19-13(2)

fined in subsection 67-19-12(2)(e)" for "the salary survey and to provisions for superior performance increases and incentive awards" in the second sentence of Subsection (2)(g); inserted the third sentence in Subsection (2)(g); deleted "and selective salary adjustments" after "pay plan" in the fourth sentence of Subsection (2)(g); added two sentences relating to survey of benefits in Subsection (3); and made minor changes in phraseology, punctuation, and style.

The 1984 amendment substituted "steps" for "grades" in the first sentence of Subsection (2)(a); substituted references to salary range for references to salary grade in Subsections (2)(a) and (2)(b); deleted former second and third sentences of Subsection (2)(c); deleted a Subsection (2)(i); substituted "biennially" for "annually" in the third sentence of Subsection (3); substituted the fourth through sixth sentences of Subsection (3) for a sentence which read: "The survey shall be a cross section of the various types and sizes of employers throughout the state and the results shall be weighted to remove any bias caused by uneven responses"; and made a minor change in phraseology.

The 1985 amendment by ch. 122, effective March 16, 1985, substituted "pay plans" for "pay plan" in two places and "all pay plans" for "the pay plan" in Subsection (2); substituted "Pay plans" for "The pay plan" and "grades" for "steps" once each and "grade" for "range" in two places in Subsection (2)(a); substituted "grade" for "range" in three places in Subsection (2)(b); substituted "rules" for "regulations" in three places and "pay plans" for "the pay plan" in one place in Subsection (2)(c); rewrote Subsection (2)(e), which formerly read as amended by Laws 1983, ch. 332, § 5; redesignated former Subsection (f) as present Subsection (f)(i); substituted "may" for "shall" in Subsection (f)(i); substituted "conduct" for "recommend revisions in pay ranges to achieve comparable rates to those paid by private enterprise. The recommendations shall be based on" in Subsection (f)(i); deleted the former next-to-

last sentence of Subsection (f)(i) which read, "Surveys shall be scheduled to provide data on all positions every two years"; added "and may cooperate with or participate in surveys conducted by other public and private employers" at the end of Subsection (f)(i); added Subsection (f)(ii); substituted "consider the recommendations made on the basis of Subsection (2)(e)" for "include the labor market change adjustments" in Subsection (2)(g); deleted the former second and third sentences of Subsection (2)(g) which read as amended by Laws 1983, ch. 332, § 5; substituted "plans" for "plan" in Subsection (2)(h); deleted "job security" after "leave" in Subsection (3); substituted "in conjunction with the salary survey provided under Subsection (2)(e)" for "biennially to provide this information" in Subsection (3); added the last sentence of Subsection (3); substituted "October 31" for "October 30" in Subsection (4); and made minor changes in phraseology.

The 1985 amendment by ch. 203 inserted Subsection (1)(g); substituted "rules" for "regulations" in two places and "provide" for "make provision" in one place in Subsection (2)(c); deleted "of this section" before "regarding" in the next-to-last sentence of Subsection (2)(i); and made minor changes in phraseology.

The 1986 amendment substituted present Subsections (1) through (3) for former Subsection (1); redesignated former Subsection (2) as present Subsections (4)(a) through (4)(c); redesignated former Subsection (3) as present Subsections (5)(a) through (5)(c); redesignated former Subsection (4) as present Subsections (6)(a) through (6)(c); and made minor stylistic changes.

Effective Dates. — Section 2 of Laws 1984, ch. 70 provided: "This act shall take effect on July 1, 1985."

Cross-References. — Career service system in attorney general's office, §§ 67-5-6 to 67-5-13.

Executive director of Department of Community and Economic Development, § 63-33-2.

State Board of Education, Chapter 2 of Title 53.

67-19-13. Examination of payrolls and certification of employee eligibility by director.

(1) The director of personnel management may examine payrolls at any time to determine conformity with this chapter and the regulations.

(2) No new employee shall be hired in a position covered by this chapter, and no employee shall be changed in pay, title or status, nor shall any employee be paid unless certified by the director as eligible under the provisions of or regulations promulgated pursuant to this chapter.

History: C. 1953, 67-19-13, enacted by L. 1979, ch. 139, § 19.

Cross-References. — Administrative rule-making, Chapter 46a of Title 63.

67-19-14. Sick leave — Unused sick days — Early retirement program.

(1) The director shall, as an incentive to reduce sick leave abuse, promulgate rules and regulations governing procedures whereby, after an employee has accumulated 18 unused sick leave days, any sick days accumulated during any calendar year in excess of eight, at the option of that employee, may be carried as "converted sick leave" which the employee may use at a later date as annual leave, regular sick leave, or as paid-up health and medical insurance at the time of retirement on the basis of the payment by the employing department of one month's premium for each day of accumulated sick leave.

(2) (a) The director shall promulgate rules and regulations for the governance of an early retirement program. Employing departments may offer an early retirement option to an employee. Employee participation in the early retirement program shall be entirely voluntary. An employee must be eligible for retirement benefits to qualify for the program.

(b) The program shall provide for an employee to be paid for 25% of unused accumulated sick leave at the employee's preretirement rate of pay. The employing department shall also provide health and life insurance benefits until the employee reaches age 65, but not to exceed five years' coverage from the date of retirement. An employee's health and life insurance benefits under the program terminate at death.

(c) An employee under the age of 60, whose unused sick leave, after the 25% cashout has been paid, exceeds the 60 days maximum for five-year coverage under Subsection (b), may continue health and life insurance at the rate of one month's coverage for each day of unused sick leave above the 60 days, but not to exceed coverage beyond age 65.

(d) Any costs or savings for this act shall be borne by the agency and shall not be appropriated by the Legislature.

History: C. 1953, 67-19-14, enacted by L. 1983 (1st S.S.), ch. 19, § 1.

Repeals and Enactments. — Laws 1983 (1st S.S.), ch. 19, § 1, repealed former § 67-19-14 (L. 1979, ch. 139, § 20; 1983, ch. 232, § 6; 1983, ch. 334, § 1; 1983 (1st S.S.), ch. 18, § 1), relating to sick leave rules and regulations, and enacted the above section.

Meaning of "this act". — The term "this act," referred to in Subsection (d), means Laws

1983 (1st S.S.), ch. 19, § 1, which appears as this section.

Effective Dates. — Section 2 of Laws 1983 (1st S.S.), ch. 19 provided: "This act shall take effect upon approval." Approved August 10, 1983.

Cross-References. — Administrative rule-making, Chapter 46a of Title 63.

State retirement, Chapter 10 of Title 49.

AMENDED

67-19-15. Coverage of career service provisions.

(1) Except as otherwise provided by law or by rules and regulations promulgated for federally aided programs, the following positions shall be exempt from the career service provisions of this chapter:

(a) the governor, members of the Legislature, and all other elected state officers;

Utah Code Ann. Section 63-46b-16 (4) (1987)

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted "except final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

-46b-16. Judicial review — Formal adjudicative proceedings.

1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(c) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure [Rules of the Utah Supreme Court], except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

History: C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273. § 315 makes the act effective on January 1, 1988.

Effective Dates. — Laws 1987, ch. 161,

63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

DIVISION OF PERSONNEL MANAGEMENT
UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES
PERSONNEL MANAGEMENT RULE 2.b. (1986)

DIVISION OF PERSONNEL MANAGEMENT
UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES
PERSONNEL MANAGEMENT RULE 2.c. (1986)

2-0 ADMINISTRATION

Effective Date July 1, 1986

2.a. Applicability

These rules apply to all career and non career state employees except those exempted from these rules and the Personnel Management Act, 67-19-12 UCA, Amended 1986, as follows. Those positions which are exempted are invited to voluntarily follow these rules as guidelines.

2.a.(1) Members of the Legislature and legislative employees; members of the judiciary and judicial employees; elected members of the executive branch and their direct staff who are merit (career)-exempt employees; certificated employees of the State Board of Education; officers, faculty, and other employees of state institutions of higher education; any positions for which the salary is set by law; attorneys in the attorney general's office; department heads and other persons appointed by the governor when authorized by statute; and employees of the Department of Community and Economic Development whose positions are designated as executive/professional positions by the executive director of the Department of Community and Economic Development with the concurrence of the director of the Division of Personnel Management.

2.a.(2) Certificated employees of the State Board of Education and professional exempt employees of the Department of Community and Economic Development specified in 2.a.(1) are covered by all provisions of these rules except those governing classification and compensation in sections 4-0 and 7-0, subsection 7.d. (New Rule, 9/19/86)

2.a.(3) All other positions designated as exempt are covered by all provisions of these rules except those governing career service status in sections 5-0, 6-0, 9-0 and 11-0.

2.a.(4) Non-state agencies whose employees receive merit system protection from the career service provisions of these rules in section 5-0, 6-0, 9-0 and 11-0 shall be excepted, by contract, from any provisions deemed to be inappropriate in such jurisdictions by the Director.

2.b. Role of Division of Personnel Management

As staff support to the Governor, the purpose of the Division of Personnel Management is to facilitate improvement in the management of human resources and to provide professional personnel services to state and local government which emphasize human dignity. DPM is responsible for the following:

2.b.(1) Establishment of, and monitoring compliance with, statewide policies, rules, standards and procedures governing employment with the State of Utah.

2.b.(2) Technical assistance, coordination and support of personnel activity in agencies having their own personnel management resources.

NEW

2.b.(3) Comprehensive personnel support of those agencies which do not have their own personnel management resources.

2.b.(4) Final approval of all personnel actions taken by agencies.

2.c. Compliance responsibility

Individuals are employed by the State of Utah but directed in their assignments by agencies, which agencies have the responsibility to manage their own human resources in compliance with these rules, reserving the ability and authority to correct administrative errors.

2.c.(1) The Director may authorize special exceptions to provisions of these rules when permitted by law and when justified by unique and compelling circumstances in an agency consistent with Section 2.b.

2.c.(2) Agency personnel records, practices, policies and procedures are subject to audit by the Division of Personnel Management.

2.c.(3) In accordance with 67-19-13(2) UCA, no new employee shall be hired in a state position covered by this statute, and no employee shall be changed in pay, title or status, nor shall any employee be paid unless certified by the Director as eligible under the provisions of or rules promulgated according to this act.

2.c.(4) In cases of serious noncompliance with the State Personnel Management Act, 67-19 UCA, and the rules contained herein, the Director may find the responsible agency official to be subject to the penalties prescribed by 67-19-18(1) UCA pertaining to misfeasance, malfeasance or nonfeasance in office.

2.d. Discrimination

It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to a particular position without regard to age, race, creed or religion, color, handicap, sex, national origin, ancestry, political affiliation, or any other non-merit factor. Further, it is the policy of the state that no person shall be subjected to sexual harassment by a state employee while seeking to attain employment or being employed in state government.

2.d.(1) Any employee alleging discrimination may submit his/her claim to the department head [or within the department]. If the employee does not agree with the decision of the department head, he/she may file a complaint with the Utah Anti-Discrimination Division. No actions by any State official shall preclude any employee from timely filing of a discrimination complaint in accordance with State and/or federal requirements.

DIVISION OF PERSONNEL MANAGEMENT
UTAH DEPARTMENT OF ADMINISTRATIVE SERVICES
PERSONNEL MANAGEMENT RULE 7.d.(2)(f) (1986)

<u>Performance Rating</u>	<u>No. of Steps</u>	<u>No More Often Than</u>
"Outstanding"	1 or 2	Every 12 months
"No Less Than Above Standard"	1	Every 12 months
"No Less Than Standard"	1	Every 24 months
"Below Standard"	No increase	

7.d.(1)(d) Productivity increases for part-time employees will be on the basis of full-time equivalency in hours, except for job sharing positions which shall be on a calendar basis.

7.d.(1)(e) Productivity and performance increases must be accompanied by the results of a performance appraisal conducted within the twelve months preceding the salary adjustment.

7.d.(2) Promotions and salary range advancement within career ladder series

7.d.(2)(a) For a promotion of one or more grades, a minimum of one step above the salary on the present grade shall be granted.

7.d.(2)(b) Promotional increases up to the midpoint of the pay range shall be allowed recognizing management's responsibility and authority to manage its human resources, assuring conformance with budget appropriations and equitable treatment of employees.

7.d.(2)(c) For two or more grade promotions above the midpoint of the salary range, a minimum of one step or a maximum of two steps shall be granted.

7.d.(2)(d) Employees who are promoted while currently on a longevity step may receive step increases provided such increase will not exceed the top step of the regular range. If the current longevity step exceeds the top step of the higher grade range, only an adjustment to the closest higher longevity step on the new grade may be granted. An adjustment only will not affect the five year waiting period between longevity steps. (See Section 7.d.(3)(d))

7.d.(2)(e) If, in determining an increase, the new salary is below the minimum rate of pay for the new position, it shall be increased to the first step of the new range. If the adjusted salary is an amount between steps on the new salary range, the salary shall be increased to the next higher step.

- 7.d.(2)(f) To be eligible for career service promotion, an employee must meet the minimum qualifications specified in the class specification for the position and must have received a standard or higher performance rating within the last twelve months.

7.d.(3) Longevity

Under the following conditions career service employees will be eligible for a longevity increase.

- 7.d.(3)(a) Career service employees must have been in state career service for eight (8) years or more.
- 7.d.(3)(b) The required eight (8) years of career service need not have been continuous and may have accrued through service in more than one agency.
- 7.d.(3)(c) The employee must have been at or above the top step of the current range at least one year at the time of eligibility.
- 7.d.(3)(d) An employee in longevity will be eligible for the same across-the-board pay plan adjustments received by employees within their range or approved pay plan(s), and will be eligible for additional longevity increases at five year intervals with standard performance or better, provided the employee does not receive a pay action which places him/her back within an approved pay range.

7.d.(4) Reclassification

If a classification study changes a grade/level allocation either up or down for a class or classes, incumbents of the affected class whose salary rate cannot be found in the new range shall either be adjusted to the closer higher dollar figure on the new salary range or be "red circled" in the new range until the time of the next salary eligibility date. At the time of the next salary eligibility date, agency management shall make the salary adjustment and may grant step increases in accordance with guidelines in 7.d.(1). Where the "red circle" rate exceeds the maximum of the new range, this requirement is waived. In no event shall an employee be paid beyond the top of the salary range established for that position for a period longer than two (2) years, except in cases of longevity.

These provisions shall also apply when an individual employee voluntarily accepts an appointment to a position which has a lower grade/level than the position previously held.

UTAH PERSONNEL REVIEW BOARD
STATE EMPLOYEES' GRIEVANCE AND APPEALS PROCEDURE
RULE 18.16.3 (1983)

18.16.3 The Hearing Officer's decision and order will be filed with and distributed to the parties by the Executive Secretary and shall, without further action, become the decision and order of the Board.

18.16.4 In those appeals where the Hearing Officer does not render a decision within 20 working days, the Agency that is a party to the action is not liable for any claimed back wages or benefits from the expiration of the permitted time for rendering the decision to when the decision is rendered.

18.16.5 A Hearing Officer's decision at Step 5 is considered binding upon the Agency, unless the Agency appeals a Step 5 decision to the Board. ✕

18.16.6 State Agencies are expected to comply with orders issued pursuant to a Hearing Officer's decision under the Utah State Personnel Management Act, which provides that such orders shall have the force and effect of law.

18.16.7 Enforcement measures available to the Board include: (a) involving the Governor, who may remove most State Officers with or without cause; and with respect to those who can only be removed for cause, refusal to obey a lawful order would probably constitute sufficient cause for removal; (b) a mandamus action to compel the Officer to obey the order; and (c) charge of a Class A misdemeanor or violation.

18.17 Exclusionary Rule

Prior to every hearing the Agency is to designate its Management Representative who is entitled to remain throughout the hearing to represent the Agency at any proceeding. The Department Head or Agency Director, or designee, may represent the Agency during the hearing.

18.17.1 Neither the Employee nor the Management Representative shall be excluded from the hearing.

18.17.2 Witnesses not presently testifying may be excluded on motion by one or both parties. Witnesses are to be counseled not to discuss the case with other witnesses prior to testifying.

18.18 Hearsay Rule

Hearsay evidence is admissible during these informal administrative hearings at the discretion of the Hearing Officer, who shall give such evidence the proper weight that it deserves. No Decision shall be supported solely upon hearsay evidence.

19.0 THE BOARD

19.1 Board Membership:

19.1.1 The Board shall consist of five members, each appointed by the Governor, for four year terms.

Gallegos v. Office of Recovery Services,
Case No. 2 PRB 20 (1986)

BEFORE THE PERSONNEL REVIEW BOARD OF THE STATE OF UTAH

In the Matter of:	:	
PATRICIA B. GALLEGOS,	:	
Appellant,	:	DECISION
v.	:	
OFFICE OF RECOVERY SERVICES,	:	PRB 86-4
Respondent.	:	
	:	Case No. 2 PRB 20 (1986)

The above-entitled matter came on for hearing on July 31, 1986, pursuant to notice, in the Governor's Board Room, State Capitol, Salt Lake City, Utah. The following Personnel Review Board ("Board") members were present: Chairman Peter Fillmore, Mary Graham-Payne and Dalmas H. Nelson. Excused absence: Anita C. Bradford. Recused: Jose L. Trujillo. At the appeal hearing's onset it was learned that Patricia B. Gallegos' ("Appellant") attorney, Mr. Fred Wasilewski, was then hospitalized and could not be present. Chairman Fillmore offered the Appellant three choices: an opportunity to make her own oral presentation to the Board, to have the Board issue a decision based upon the previously submitted briefs, or to continue the hearing to a date when her attorney could be present. Appellant selected the proffered continuance and the hearing's postponement was stipulated to by the Board's Chairman and the Appellant.

Pursuant to notice the appeal hearing was next scheduled for August 19. However, that date was cancelled on the day before when it became known that the Board could not assemble a quorum. Thereafter, notice was mailed and the appeal hearing scheduled for and held on September 16, 1986 in Room 405, State Capitol, Salt Lake City, Utah. Board members present on that occasion included: Chairman Peter Fillmore, Anita C. Bradford and Dalmas H. Nelson. Recused: Jose L. Trujillo. Absent: Mary Graham-Payne.

Patricia B. Gallegos was present and represented by legal counsel, Fred Wasilewski, attorney for the Western Alliance of Government Employees. The Office of Recovery Services ("ORS") was represented by Assistant Attorney

Investigator, Level II position. After her promotion was denied at the Department level, Appellant filed a grievance dated August 15, 1985 claiming that she had been improperly denied a promotion to ORS Investigator, Level II.

Ms. Gallegos' gravamen stated, "I feel I have been unjustly denied a promotion to a Level II Investigator [position] with the Office of Recovery Services." She stated her remedy to be: "A retroactive promotion to a Level II Investigator [position] effective date [sic] April 2, 1985." Subsequently Appellant's grievance proceeded through Steps 2, 3 and 4 of the State's grievance procedure.

The Step 4 process consisted of a departmental hearing in which an administrative law judge conducted an evidentiary hearing. When the Step 4 decision was issued to Ms. Gallegos, that decision resolved a timeliness question in her favor but denied her grievance in its entirety on grounds that she had failed to support her claim with substantial evidence.

Ms. Gallegos thereafter requested a Step 5 hearing before a Board hearing officer. The second de novo hearing was held on March 13, 1986. Board Hearing Officer Robert S. Adams addressed the following two questions:

- (1) Was the grievant [Patricia B. Gallegos] improperly denied a promotion to a Level II Investigator with the Office of Recovery Services?
- (2) If so, what is the appropriate remedy?

After making findings of facts and conclusions Hearing Officer Adams denied Appellant's grievance as it pertained to her request for promotion to an ORS Investigator, Level II (at grade 21) position, with a requested retroactive date effective April 2, 1985, on the basis of her not meeting minimum qualifications as of that date. From that determination, Ms. Gallegos brought her appeal to the Board at Step 6.

Ms. Gallegos is the appealing party at Step 6. As such, she shoulders the burdens of proof and persuasion. She must show that the hearing officer's findings of facts are either critically erroneous or that by omission they lack substance, so as to constitute reversible error in either situation; or, that the Step 5 Decision's conclusions are not warranted by the facts and circumstances of the case. Accordingly, the Board will give considerable

- (7) That the Appellant requested promotion to level II on the premise of prior employment as Youth Corrections Counselor 17 and completion of a ten (10) week military interrogator school.

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- (9) That personnel management responsible for employees in Recovery Services determined the Appellant's prior employment was not sufficiently related to accommodate the minimum requirements for Level II on the date in question.

From the just-quoted findings, the hearing officer set forth the following conclusions which are herein summarized from pages 3-4 of the Step 5 Decision:

- Appellant initially met the required minimum qualifications for the ORS Investigator I position through her bachelor's degree in sociology.
- Not until about April 2, 1985 when Appellant sought to trigger her promotion to ORS Investigator II did the issue of two years' "related experience" become a factor of consideration in her circumstance. At that time an additional two years of related job experience or education was required for her to meet Level II minimum qualifications from her date of hire.
- The Division of Personnel Management's ("DPM") approved class specifications are the controlling document in setting forth minimum qualifications, not job announcements (upon which Appellant had relied).
- DPM's Personnel Management Rules and Regulations (1985 ed.), Section 7.d.(2)(e), requires an employee to meet minimum qualifications as a pre-requisite to being promoted:

To be eligible for career service promotion, an employee must meet the minimum qualifications specified in the class specification for the position

fail. Only because Green received credit for prior collections' activities can Ms. Gallegos assert her case. She has chosen to link her work experience claim to Green's situation. However, given the decision that ORS management made anent Green, that decision is not dispositive in Appellant's situation. Her case turns on the analysis of her three prior work experiences: whether or not the experiences individually, or two or more collectively, qualify her for the Investigator II position. Consequently, equity per se is not the threshold issue. Job-related professional level employment experience (as defined by the State) is the paramount issue.

Regarding the principle of equity, the Board previously addressed that issue in a case in which it rejected one of its (former) hearing officer's decisions which had been based solely upon a "matter of equity." Division of Environmental Health v. Jay B. Pitkin and Calvin K. Sudweeks (2 PRB 15, 1984), p. 8. After citing Black's Law Dictionary's definition, we stated: "Equity alone, however, is not a controlling principle upon which employment relations' remedies are conditioned." Ibid. Ms. Gallegos' gravamen must either stand or fall based upon whether the evidence supports her claim toward meeting the established criteria in the class specification for ORS Investigator II.

It is not sufficient to assert that equity or fairness per se should supplant managerial discretion. Appellant, to prevail, must show that rules have been breached and that such breaches caused her harm.

IV.

ORS, and in turn, the Department of Social Services, are part of a much larger body, the State of Utah workforce under the executive branch of government. To provide a reasonable as well as a manageable system of organizing that workforce laws and rules are in effect. Utah law authorizes DPM to design and administer a state-wide system of classifying job titles, duties and responsibilities and of setting qualifications to fill job positions. Utah Code Annotated 1953, as amended, Section 67-19-8(2). Furthermore, DPM is empowered to establish procedures to implement its classification system. (Ibid.)

(2), two prior employment experiences considered either individually or in combination, which preceded her ORS employment together with a brief military schooling. Both ORS management and Department personnel staff rejected her claim to entitlement to the Investigator II position as of April, 1985 in Exhibits 9 and 10. A Departmental legal decision ("Step 4 Decision") and the hearing officer's Step 5 Decision addressed her issues of complaint and provided adequate explanations. The Board's review and decision is one more explanation to the several already provided to her.

Exhibits 1, 2 and 3 are job announcements issued by the Department of Social Services. Essentially these announcements are the same except for some distinguishing opening/closing dates and announcement numbers, although a slight difference exists in the texts of the examples of duties. (Cf. Exh. 3 with Exh. 1 and 2).

Exhibits 1, 2 and 3 each state in pertinent part under the caption "Minimum Qualifications":

Level I: A Bachelor's degree or substitutions on a year-for-year basis as follows: Full-time paid Level II investigative technician or professional employment in law, accounting, mathematics, public or business administration, law enforcement, social services, or related fields for the required college education. Level II: Meets Level I minimums with an additional two years of education or experience as outlined above.

In those job announcements, Appellant has relied upon the phrasing of "professional employment in . . . social services" to satisfy the Level II requirement of "an additional two years. . . experience" beyond the ORS Investigator I minimums. Appellant argues that because these job announcements stated that credit for employment experience could be granted for professional employment in the social services, then any or all of her three previous job/military schooling experiences should be credited toward fulfilling the time-in-grade promotion criteria.

Concededly if the job announcements were the governing document, that might be the case. However, Personnel Management Rules and Regulations (1985 ed.), Section 7.d.(2)(e), establishes the supremacy of classification specifications ("class specs") over job announcements in the promotion of career service employees. Such employees must meet the minimum qualifications

Appellant had to rely upon her bachelor's degree to meet minimum qualifications. Therefore, sub-item (2)(a) is also not applicable to her circumstances.

Turning to sub-item (1), a bachelor's degree is specified (which Ms. Gallegos fulfills by her degree in sociology) together with two years of "full-time paid professional related employment." Ms. Gallegos avers that she meets that two year job experience requirement due to her twelve months (April 2, 1984 - April 2, 1985) of service as ORS Investigator I and through a combination of three prior experiences: ten weeks' attendance at a military interrogation school, eight months as a counselor-aide with IHRD and nine months of service with the State as a Youth Corrections Counselor I.

Each of these employment situations will be reviewed briefly below.

Appellant attended the United States Army Intelligence School at Fort Huachuca, Arizona for a specialized interrogator's course, which lasted about 10 weeks. (T. p. 26-27) That experience occurred while she served on active duty with the Army in 1981-82. (Ibid.) No certificate of completion was introduced into evidence to authenticate her training. Nonetheless, an interrogator's schooling experience such as Appellant's, would not qualify as professional related employment. Concededly, a schooling experience -- depending upon its nature and content -- might be credited toward training or education requirements. Clearly in the instant case, personnel staff discounted any credit for the interrogator's schooling due to its being unrelated to ORS functions, despite Ms. Gallegos' opinion to the contrary.

Next, Appellant sought credit for eight months' employment as a counselor-aide with the Institute of Human Resource Development. In this position she functioned under the Comprehensive Employment and Training Act program, more commonly known as "CETA." During its life-span CETA provided government-funded employment, primarily in the public sector, and usually at the entry or training levels. A major CETA objective was to provide paid employment opportunities to Vietnam era veterans, the unemployed, the underemployed, AFDC mothers, minorities, etc., so that public employers might absorb such individuals from time-limited or temporary into permanent positions; or, that such work experiences would allow CETA-trainees to be accepted into the mainstream of private sector employment.

As the agency's attorney has stated on p. 9 of his brief, Appellant's testimony shows that "the counselor-aide position was not a professional level position. It was a training position or a para-professional position." We agree.

The third employment experience which Ms. Gallegos has attempted to apply toward meeting the Investigator II minimum qualifications is that of her service as a Youth Corrections Division Counselor I. In that capacity she served nine months, beginning January 20, 1983, at a salary Grade 17. (T. pp. 16-17) The Department has denoted Grade 17 or higher as being at the "professional level" of employment. (See Exh. 13, p. 2) Thus, Appellant thereby meets part of the requirement for the ORS Investigator II minimum qualifications, that a position requires "professional level" employment experience, meaning Grade 17 or higher. However, she fails to meet the other part of the requirement which focuses on related as in "professional related experience."

Appellant provided information to the hearing officer on eleven duties, tasks and responsibilities that she had performed as a Youth Corrections Counselor I, which she perceived as being "related" to her ORS Investigator I position. (T. pp. 18-20). Yet her testimony, which in reality is opinion evidence and stands by itself, remains uncorroborated. Consequently, she is unconvincing in her argument that her Youth Counselor I duties are sufficiently related to her Investigator I duties. As noted by Respondent's counsel, "On cross-examination Gallegos admitted that she had no responsibility to collect monies or serve papers or garnishments or orders to show cause in either the Youth Corrections position or the IHRD job." (T. pp 48, 49) Nor did Appellant engage in locating dependents' financial assets, verify their income, determine ownership of property or search out employment records in her work activities at IHRD or Youth Corrections, as do ORS Investigators. (T. pp. 48-49, 78, 80)

Two documents introduced into evidence are probative in showing that a Youth Corrections Counselor I is sufficiently distinguishing in duties, responsibilities and examples of work compared with an ORS Investigator I as to be unrelated for classification purposes. These documents are Exh. 4 (class spec for ORS Investigator I, effective March 15, 1985) and Exh. 8 (Youth Corrections Counselor I, effective November 15, 1982.) Under Paragraph III, "Examples of Work," Exh. 4 states:

provides intensive supervision of delinquent youth in group setting, individual encounters, visitation, community treatment needs and standards for adolescents in custody; provides security for individual group, center and community; is educated on and assists in preparation of clinical documentation for parole boards, treatments and disciplinary teams, juvenile court, program coordinators and other professionals; attends and participates in meetings; orally presents plans, recommendations, treatment goals, and progress with ability to defend, verify and factually interpret recommendations; works closely with high risk/violent adjudicated offenders with respect to implementing treatment plans, apprehension of absconding youth, transporting, critical incident investigation with respect to chain of evidence; performs other counseling related duties as assigned.

The above documents provide conclusive evidence to show that the Youth Counselor I class spec is sufficiently unrelated to the ORS Investigator class spec so as to fail the "relatedness" standard. Appellant did not meet the minimum qualifications of two years' of "professional related employment" as ORS Investigator I as of April 2, 1985 to qualify for promotion to the ORS Investigator Level II.

In oral argument Appellant has charged that the State's criteria are both vague and ambiguous. However, the Board finds the above-quoted class specifications' work examples to be reasonably clear and unambiguous. Importantly, the Department's established criteria define job-relatedness. (See p. 2 of Exh. 13). And, classification analysts received adequate guidance to evaluate an individual's training and experience pursuant to the "Criteria for Training and Experience Evaluation" form (Exh. 13, p.1). Thereon, job related experience is categorized as either "directly related" or "generally related."

Directly related job experience is defined thus:

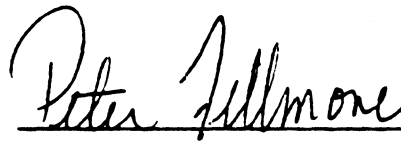
Directly related: Investigation and preparation of obligation or debt cases for court to establish judgments and initiate legal enforcement remedies such as garnishment of wages, execution on property, etc. Prepare criminal cases for prosecution, negotiating monthly repayment agreements and lump sum settlements.

DECISION:

The appeal is denied.

DECISION UNANIMOUS.

D A T E D this 2nd day of October, 1986.



Chairman, Peter Fillmore
Utah Personnel Review Board



Robert N. White, SPHR
Administrator & Executive Secretary
Utah Personnel Review Board

Any appeal from the Board's decision must be made within 20 calendar days from issuance of this decision with the District Court for Salt Lake County. On appeal to District Court, the Board's findings of fact, if supported by substantial evidence, shall be conclusive. Utah Code Ann. 1953, as amended, Section 67-19-25(6).

Craythorn et al. v. Office of Community Operations,
Case No. 4 PRB/H.O. 60 (1986)

FILED
FEB 07 1986

BEFORE THE PERSONNEL REVIEW BOARD OF THE STATE OF UTAH ATTORNEY GENERAL
200 STATE CAPITOL

In the Matter of:	:	
MARY CRAYTHORN and DIANNA EVANS,	:	FINDINGS OF FACT,
Grievants,	:	
	:	CONCLUSIONS OF LAW,
v.	:	
	:	AND DECISION.
OFFICE OF COMMUNITY OPERATIONS,	:	
Respondent.	:	

HO 86-2
4 PRB/HO 60

In compliance with Utah Code Ann., 1953 as amended, Section 67-19-25(5), the above-entitled matter came for an administrative hearing at Step 5 on the 9th day of January, 1986 before Sherri R. Guyon, the duly designated Hearing Officer in Room 5100 of the State Office Building. The grievants appeared personally and were represented by Susan M. Kuziak, Utah Public Employees' Association. Present as witnesses in the grievants' behalf were Brent Ellis, Supervisor, District II(C), Office of Community Operations, Doyle Christensen, Supervisor, District II(C), Office of Community Operations, and Wendi Wolfard, Human Service Supervisor, Office of Community Operations.

The District II C Office of Community Operations, Department of Social Services, was represented by Neal T. Gooch, Assistant Attorney General. Bel J. Randall, Manager, Bureau of Personnel, Staff Development and Training, Department of Social Services was present as management's representative. Present as the witness on behalf of the Department was Constance First, Personnel Management Specialist, Bureau of Personnel, Staff Development and Training, Department of Social Services.

A court reporter made a verbatim record of the proceeding; testimony and documentary evidence were received into evidence. Witnesses were placed under oath. This Hearing Officer now makes and enters the following:

Issue: Were Grievants improperly denied a promotion? If so, what is the appropriate remedy?

were based on verbal notification by the Bureau of Personnel, Staff Development and Training, Department of Social Services, to the District Office that all promotions have to be approved by the Bureau of Personnel as to meeting the minimum qualifications of the particular class specification. The Bureau of Personnel, Staff and Development and Training had reviewed Ms. Craythorn's application and had determined that she had not met the minimum educational or substituted experience requirement.

It is the policy of the Bureau of Personnel in the Department of Social Services that the State Department of Personnel Management Form 33 (State of Utah Human Resource Profile and Notice of Personnel Action) that is sent on promotion actions be accompanied with a formal application; so certification of the particular minimum qualifications can be made.

Due to what was termed as "procedural breakdown," the District Office did not do this prior to grievant's promotion. Thus, in August, 1985, the Bureau of Personnel requested that a formal application be submitted by grievant. Grievant submitted a formal application on August 13, 1985, stating her State employment history as set forth above.

Constance First, Personnel Management Specialist, Bureau of Personnel, reviewed the formal application of grievant and the class specification of Human Service Worker Intake II and determined the following in her memo dated September 4, 1985:

[T]he Human Service Worker (Intake II) requires a bachelor's degree in the social sciences, public or business administration, accounting, or related fields, OR substitutions on a year-for-year basis of full-time paid employment in Records Management Level II or the equivalent or higher work for the required college study. Records Management II is at the Grade 15 pay range and handles the most difficult case management functions.

Ms. Craythorn's application shows no post-high school education and that she has filled an equivalent position to Records Management II since December, 1983. As stated before, four years of Records Management II employment are required as a substitute for the required bachelor's degree. 'To be eligible for career service promotion, an employee must meet the minimum qualifications specified in the class specification for the position.' Personnel

Records Management III position, grievant performed as a Senior Tract Worker and continued in this capacity until approximately October, 1984.

Around this time, she formally applied for a Human Service Worker Intake II in District II(N); however, she was told by the supervisor that she was not qualified because she did not have four years at the grade of Records Management II. She accepted an underfill of the Intake II at an Intake I (Grade 15).

Grievant voluntarily took a downgrade from a Grade 17 to a Grade 15, because she had reached the highest level. She felt she was at a standstill and took the underfill Intake I (Grade 15) position to get the training and experience of doing intake work.

In February, 1985 grievant transferred back to the District II(C) Office in Clearfield. She remained in the Intake I (Grade 15) position.

The Agency, on May 22, 1985, internally advertised for three positions, Human Service Worker Intake III (two positions) and Human Service Worker Intake II. The Intake III positions would be at a Grade 21 and the Intake II position would be at a Grade 17. The grievant submitted a memorandum dated June 5, 1985 to Don Koldewyn expressing her interest in the Intake III position.

The grievant was selected for the Intake II (Grade 17) position, but was told that it would be underfilled at Intake I (Grade 15). Grievant's duties changed significantly from her previous duties as an underfill Intake I. Specifically, as of June, 1985, she began and has continued to do the same duties under general supervision as set forth in the class specifications of an Intake II (Grade 17).

It is the policy of the Bureau of Personnel, Staff Development and Training, Department of Social Services, that the State Division of Personnel Management Form 33 (State of Utah Human Resource Profile and Notice of Personnel Action) that is sent on promotion actions be accompanied with a formal application so certification of the particular minimum qualifications can be made. Due to what was termed as a "procedural breakdown," the District Office did not request a formal application when it considered grievant for the Intake II position in June of 1985.

The grievant was subsequently requested to and did complete a formal application for the Intake II position on June 13, 1985. Within that application, she set forth her State employment history, giving her official

minimum qualifications and equivalent work for promotion and, in the case of Ms. Craythorn, her reassignment to her former grade and salary level.

Minimum Qualifications and Equivalent Work for Promotion

The Division of Personnel Management Rules and Regulations, Section 7.d.(2)(e) provides:

To be eligible for career service promotion, an employee must meet the minimum qualifications specified in the class specifications for the position and must have received a standard or higher performance rating within the last twelve months.

The minimum qualifications set forth under the Intake II (Grade 17) specifications provide:

Education and Experience

(1) A bachelor's degree in the social services, public or business administration, accounting, or related fields.

OR

(2) Substitutions on a year-for-year basis as follows:

(a) Full-time paid employment in Records Management level II or the equivalent or higher work for the required college study.

Because neither of the grievants has a bachelor's degree, to meet the minimum qualifications for promotion each must qualify with at least four years of experience. The Agency contends that the "equivalent or higher work" experience must be that of a Grade 15 or higher, since a Records Management level II is a Grade 15. Since neither of the grievants has the requisite work experience at Grade 15, each contends that her work at another lower level is "equivalent" to Grade 15, in terms of duties and supervision level and should be counted. Specifically, Ms. Craythorn contends that she has been performing the equivalent duties of Records Management level II work since August 22, 1981 and, thus, she meets the minimum qualifications under the job specification of an Intake II (Grade 17) for substitution on a year-for-year basis for the bachelor's degree as of August 23, 1985. She was, however, in a position classified as a Grade 13 between August 22, 1981 and December 10,

It is unfortunate that Ms. Craythorn was promoted to a higher grade level before certification was made as to whether or not she met the minimum qualifications for that higher position. But a "procedural breakdown" occurred, since a formal application had not been submitted with Form 33. When a formal application was submitted and it was determined that the promotion had been granted erroneously, something had to be done administratively to correct the situation. The Rules and Regulations above quoted provide for reassignment of an employee for "administrative" reasons. The hearing officer finds from the evidence presented, that the agency's administrative action of returning the employee to her former pay and grade level was reasonable under the circumstance and that the action was within the spirit and the letter of the DPM definition of reassignment.

Lund v. Division of Health Care Financing,
Case No. 3 P.R.B. 24 (1987)

BEFORE THE PERSONNEL REVIEW BOARD OF THE STATE OF UTAH

IN THE MATTER OF:	:	
A. PAUL LUND,	:	
Grievant and Respondent,	:	
	:	D E C I S I O N
v.	:	
	:	
DIVISION OF HEALTH CARE FINANCING,	:	
Respondent and Appellant.	:	Case No. 3 PRB 24

The above-entitled matter came before the Utah Personnel Review Board ("Board") as an appeal hearing, pursuant to notice, on August 4, 1987 in the Governor's Board Room, State Capitol Building, Salt Lake City, Utah. The following Board members were present: Bruce T. Jones, Chairman; Jean M. Bishop, David M. Hilbig, and Jose L. Trujillo.

The Division of Health Care Financing was represented by Robert Haywood, Personnel Manger, Bureau of Personnel, Department of Health ("Department"). A. Paul Lund, originally the grievant at the Step 5 or evidentiary level, was the respondent at the appellate level. Mr. Lund represented himself in a pro se capacity. The Division of Health Care Financing ("Division") in the role of appellant advanced the case to the Board at Step 6 of the State's Grievance Procedure.

A court reporter made a verbatim record of the proceeding before the Board, which, to date, has not been transcribed. However, the court reporter's record from the Step 5 or evidentiary level was transcribed into a one volume transcript. That transcript was made available to the parties for the purpose of submitting briefs to the Board and for use in making oral argument at the appeal hearing.

Grievant's requested remedy sought the following: "I am seeking a minimum 3 step increase in my 23 classification."

Essentially Mr. Lund's complaint involved two issues. The first issue concerns the hiring of a QMRP at grade 23 step 4 subsequent to Mr. Lund being hired at grade 23 step 1 (thereafter advancing to step 2 following completion of probation). The result of the difference in hiring salary rates was that the more recently hired QMRP was being paid two steps above the Grievant, even though she had been hired nearly eighteen months after the Grievant's hiring. The second issue is that Mr. Lund should have received a two-step increase based upon an outstanding performance appraisal given to him. As he stated in a March 2, 1987 letter to his division director: "On February 1986 I received an outstanding annual evaluation which would merit a two-step increase in pay, but was denied such because of the salary freeze." Thereafter both issues--the differentiation in the hiring rates between A. Paul Lund and Helen Middleton (with whom he chose to compare salaries) and the award of only a one-step increase following completion of a probationary term, rather than two steps--were each presented as part of his grievance and responded to at steps 4 and 5 by the Division, together with no step increase being awarded during February of FY 86-87.

B. Grievant's Employment History.

On August 26, 1985 Mr. Lund was hired as a Health Program Surveyor with the Facility Survey Section, a unit within the Bureau of Medical Review, Division of Health Care Financing, Utah Department of Health. Grievant commenced employment at grade 23 step 1. Upon completion of a standard six months' probationary period, Grievant received a one-step salary increase. For the period from November 26, 1985 through February 1986, Grievant was evaluated as being "Above Standard." (Mgt. Exh.5.) One year later Mr. Lund was again evaluated in February 1987. He was then rated for the period from January 26, 1986 to February 25, 1987 as an "Outstanding" employee. (Mgt. Exh.

Conclusion No. 1 in the Step 5 Decision states:
H. Middleton's recent hiring is irrelevant to Lund's grievance. Whatever irregularities in hiring her that may have occurred should be addressed in some other way than the scope of this decision.

This conclusion is correct: The hiring of Middleton at salary step 4 is not related to whether the former applicable personnel rules had been properly applied to Mr. Lund anent his hiring rate, his subsequent salary increase, or any lack of salary increase. Mr. Lund does not have a valid cause of action simply because another employee was hired at a later date and at a higher rate when the then existing rules permitted such.

DPM Rule 7.c.(2) (effective July 1, 1985) applied to Mr. Lund when he was hired in August 1985. The rule stated:

Individuals will typically be hired at the first step of the approved range. Hiring above the first step of the approved range may be permitted by the Director [of DMP] only under unique conditions with documentation.

The implementation of the just-stated rule caused no harm to Mr. Lund--he was hired according to a salary policy established by a lawfully promulgated rule in force at the time of his hire.

In contrast, when Ms. Middleton was hired DPM Rule 7.c.(2) (effective July 1, 1986) had been amended to read:

Individuals will typically be hired at the first step of the approved range. In the spirit of providing services to agencies and allowing management to manage human resources within their budget, agencies will have full responsibility and authority to hire up to midpoint of the approved range with the understanding the department head is held responsible for providing funding and for preventing inequities. (DPM Rule, section 7.c.(2), effective July 1, 1986.)

Thus DPM permitted different salary rates when Mr. Lund and Ms. Middleton were each hired. Each was hired pursuant to the rule in force at the time of his or her hiring. Grievant was not harmed even though the rules permitted a distinction of hiring rates.

In the above-quoted rule, agency management is granted discretion to award either a one or two step salary increase. The just-quoted rule allowed agency management to determine the number of step increases, either one or two. Moreover, the wording specifies "may be granted." Thus the granting of such a salary increase is entirely discretionary. Not only may either one or two steps be given, but a careful reading of the rule quoted above allows for situations where no increases need be offered. Step increases were not even required to be given due to the discretionary language of rule 7.d.(1)(b) (1985 ed.). It is the Board's determination that the receipt by Lund of only a one-step increase, pursuant to DPM Rules 7.d.(1)(b) (1985 ed.), does not necessarily or reasonably lead to the legal conclusion that he was "treated unfairly, arbitrarily and capriciously" based on the factual findings.

The DPM Rules in force at the time of Mr. Lund's probationary period allowed agency management to consider its personal services budget and to determine whether sufficient funds existed to grant one step increases, two steps, or none. Even within a fiscal year, an imposed budget reduction might find employees later in the fiscal year not receiving an increase that had earlier been given to employees prior to an agency's fiscal reduction. Conceivably some divisions might choose to grant only one-step increases, awarding no two-step increases. The rule does not require all similarly situated probationary employees to be treated equally or identically. We believe this to be intentional. Even if other employees in other divisions or units of the Health Department received two-step awards, that does not require the Health Care Financing Division to do likewise, unless directed to do so by senior management. Concededly, there may also be other units within the Division that might possess funding for two-step increases, and so grant them. In addition to the availability of funding, other business necessity factors might well control or justify the specific number of steps (or none) to be awarded. The exercise of the discretion inherent in the wording of the applicable rules does not constitute sufficient grounds for the conclusion that Mr. Lund's treatment was arbitrary and capricious. The record contains sufficient facts upon which a reasonable person could base the hiring and

personnel rules to receive only a one-step salary increase, he should have timely grieved the matter. Mr. Lund would have found out either on or shortly after February 18, 1986 that he was going to be receiving only a one-step increase, not two. Utah Code Ann. Section 67-19-24 states:

1. No appeal shall be submitted under this chapter unless (a) it is submitted within 20 working days after the event giving rise to the appeal or (b) within 20 working days after the aggrieved employee has knowledge of the event giving rise to the appeal.
2. Notwithstanding subsection (1)(b), no employee may submit an appeal more than one year after the event giving rise to the appeal, nor does any person who has voluntarily terminated his or her employment with the state have any standing thereafter to submit an appeal.

As Mr. Lund had knowledge of the event giving rise to his grievance in February 1986, he was untimely to initiate his grievance in February 1987. The Step 5 Decision should have recognized the untimeliness condition, but it failed to address that fact.

The hearing officer also improperly attaches fault on Mr. Lund's supervisors for "not vigorously championing extra-step increases" which would "almost certainly have been supported by the Bureau of Personnel." Such a statement is wholly speculative and merely hypothetical. It is the role and responsibility of the hearing officer to make verifiable findings and legal conclusions. It is reversible error to render a decision based upon speculation of what might have occurred in other circumstances. The hearing officer should not attempt to second-guess agency management, as to what course or decision management would take in an alternative situation, given other circumstances.

Conclusion No. 4.

The fourth and final conclusion of the Step 5 Decision states:

The proper rules and laws must be carefully applied in the adjudications at Step 5 hearings. When and if cases are determined on the basis of "equity" alone, they may not be dispositive to legally sound or logically reasoned decision-making. That principle was fixed in the previous case of Division of Environmental Health vs. Jay B. Pitkin and Calvin K. Sudweeks (2 FRB 15, 1984). In the just-cited case another hearing officer concluded that two Health Department managers were entitled to a two-step salary increase "as a matter of equity." (Ibid, p.8). In Pitkin we stated: "The Board finds that the Hearing Officer's rationale of a two-step increase for Respondents, based upon a 'matter of equity' is unwarranted" and vacated the Step 5 decision. Pitkin stated the Board's position on salary equity disputes in the following words:

Equity in the legal meaning denotes 'the spirit and habit of fairness, justice and right dealing which would regulate the intercourse of men with men. (Black's Law Dictionary, p. 484, 5th ed.) Equity alone, however, is not a controlling principle upon which employment relations' remedies are conditioned. (Ibid.)

Admittedly there will likely always exist salary inequities for some employees given the size of the State's work force, its turnover and hiring practices, its change in philosophies by different administrations and department executives, its rather persistent changing of personnel rules in order to adapt to changing conditions and exigencies, and for other germane reasons that need not be included herein.

With respect to the assertion that the two-step increase would not be a precedent, it is not necessary for the Board to determine the consequences of such a decision because there are sufficient other grounds present to reverse the decision.

However it can be noted that in attempting to resolve Mr. Lund's complaint, the hearing officer would create an inequity of great magnitude. The role of the hearing officer is to resolve grievances but in so doing he must not impose his own variety of arbitrariness nor create inequities of his own making.

McConnell v. Utah Department of Transportation,
6 PRB/H.O. 82,
Findings of Fact, Conclusions of Law and Decision,
p. 7 (October 14, 1987)

BEFORE THE PERSONNEL REVIEW BOARD OF THE STATE OF UTAH

In the matter of:	:	
BILLIE J. McCONNELL,	:	FINDINGS OF FACT,
Grievant,	:	
	:	CONCLUSIONS OF LAW
v.	:	
	:	AND DECISION
UTAH DEPARTMENT OF	:	
TRANSPORTATION,	:	
Respondent.	:	
	:	Case No. 6 PRB/H.O. 82

Authority:

In compliance with Utah Code Annotated Section 67-19-25(5), 1953, as amended, an administrative hearing at Step 5 was held with the above-named parties. The Grievant, Billie J. McConnell, was represented by Ken Wilkes, Employee Relations Representative with the Utah Public Employees' Association. The Department of Transportation was represented by Grant S. Fairbanks, Personnel Manager. The hearing was held as scheduled on August 24, 1987 in Room 5100 of the State Office Building, Capitol Hill, Salt Lake City, and subsequently continued on September 29, 1987. The decision was completed by the undersigned on September 30, 1987.

A court reporter made a verbatim recording of the proceeding, and testimony and documentary evidence were received. Witnesses were placed under oath. This hearing officer now makes and enters the following:

The Issues:

1. The grievant was initially hired in 1972 as a draftsman, Grade 9, by the Utah Department of Transportation (UDOT) and was assigned to the Cedar City office, District #5. At the time of his hiring, he had completed two years of college training as a Drafting Technologist.
2. He worked for UDOT until 1976 as Draftsman, moving from Grade 9 to Grade 13.
3. Between 1973 and 1976 he completed work for a four year certificate in Highway Engineering Technology at a major Utah university.
4. From 1976 to 1978, he worked as an Office Technician, Grade 15 to Grade 17. During this period he performed many of the duties of an Hydraulics Engineer including engineering design.

14. The Personnel Management Rules of OPM provides that "to be eligible for career service promotion, an employee must meet the minimum qualifications specified in the class specification for the position and must have received a standard or higher performance rating within the last twelve months."

15. In a series of policy statements becoming effective between 1975 and 1982, the UDOT stated that:

- a. "The Engineering Qualification Examination will be administered to individuals who meet the minimum qualification standards established by the Training and Development Unit."
- b. while a passing score on the E.Q.E. does not guarantee promotion to "engineering status" it "will establish an individual's eligibility for engineering positions as they become available."
- c. "vacancies shall be filled preferably from within the Department where employees shall be evaluated for advancement or promotion on the basis of job performance and potential."
- d. it will "promote the career development of all its permanent employees through an aggressive program from within the program. Special effort will be made to fill vacancies through consideration of current employees."
- e. in considering employees for Engineering Grades 21-27 to have a Career Board to "assist engineers in promotion and transfer through supervisor's ratings, education and experience, according to Department and individual needs."
- f. "a person may underfill a position and be promoted towards the ultimate grade without competing for the position" if among other things "he meets the minimum requirements which may be determined by examination."
- g. "Selection shall be made from among those applicants certified by the Director as being most qualified. . ."
- h. "Subject to audit by the Director, the appointing authority shall certify that an employee selected for appointment to any position. . .meets the minimum qualifications for the class to which appointed."

16. The Grievant received "acceptable" (the highest possible) ratings on job performance by his rater in February of 1987. No negative comments were noted. A general evaluative statement was made; he was "Altogether an excellent employee with great potential."

17. On May 20, 1987, the Grievant applied for an open position of Engineering Associate III in District # 5.

18. In District # 5, openings at the "professional" level are relatively rare, generally occurring only upon the death, termination or retirement of the incumbent.

19. The "Approved Class Specification" for the open position,

four year engineering curriculum; or four or more years of satisfactory engineering work. And after the above, the passing of an eight hour engineering exam. It then provides for a professional engineer's license which requires a current Engineer-in-training certificate, four more years of experience in addition to any years used for an Engineer-in-training certificate, and the passing of an eight hour engineering exam. No date or process for implementation of the new program was provided the hearing officer.

26. On July 17, 1987, the Bureau Manager of the DPM reversed his decision, finding that the Grievant did not meet the department's minimum requirements. His reversal was based on the new UDOT interpretation of the January 1, 1987 approved class specification, that pre-exam experience did not count toward qualification.

27. Before the McConnell case, UDOT field personnel, including administrators, in Districts #5 and #2, were not aware of the new UDOT interpretation.

28. At the time of this hearing, some UDOT and DPM administrative personnel at the State level were not aware of the new UDOT interpretation excluding pre-exam experience. In fact, the personnel analyst making the initial decision of qualification had not yet been informed.

29. At the time of this hearing, some state level UDOT and DPM personnel agreed with the new interpretation but usually with the proviso that there could be exceptional cases in which pre-exam experience would count toward qualification. It is not clear which if any state level administrators were aware of the new interpretation before the McConnell case.

30. District #5 field personnel agreed that McConnell was an exceptionally competent employee. At least one state level administrator agreed as to his exceptional competence.

31. The Grievant appealed the UDOT-DPM decision and such appeal was rejected.

32. In the negotiation phase of the Grievant's appeal, he indicated that he was willing to accept a lower grade level, Engineering Associate II, for the opening. The UDOT turned down the compromise offer.

Conclusions of Law:

1. The Grievant is an exceptionally well-qualified individual who has performed engineering functions well beyond that expected of technicians for as many as 10-12 years.

2. Contrary to DPM's contention that the Associate Engineer is essentially the same as a professional engineer graduate of an engineering program, they are not equal. The typical engineering

best qualified, is not an "at arms length" kind of procedure. It gives virtually absolute power especially when the Personnel Manager able to induce DPM to alter a decision on qualification.

8. Administrators are not a law unto themselves. They are bound by the policies governing the jurisdiction they have been given to administer. If Administrators can change policy at will, it is entirely possible that if they have someone they personally want to assure a slot, all they would have to do is disqualify otherwise qualified applicants on the basis of the new interpretation. This would constitute an abuse of power and be contrary to acceptable personnel practices as well as the apparent intent of state personnel policy.

9. It is clear that the existing policy at the time of the Grievant's application was to count experience previous to the E.Q.E.

10. Department policy clearly states that the E.Q.E. exam would be administered to individuals who "meet the minimum qualification standards." The Grievant was given the examination and therefore must be considered as having met the minimum qualification standards.

11. Upon successful completion of the E.Q.E., the Grievant was qualified as an applicant for the position of an Associate Engineer III position and should have been considered by the appointing authority along with other qualified applicants.

12. Department policy allows for individuals to underfill a position and be promoted toward the ultimate grade as long as they meet the minimum requirements. Because the Grievant met the minimum published requirements he was eligible to underfill the position in question.

Decision :

1. The Grievant was not given proper consideration in meeting minimum requirements for an Engineering Associate III position.

2. The UDOT violated its personnel rules by failing to consider the Grievant qualified for the Engineering Associate III position.

Remedy :

The appropriate appointing authority should consider, without prejudice, the Grievant along with all other qualified applicants at the time of the closing of the Engineer Associate III announcement. Substantial consideration must be given to the recommendations of District #5 administrators who are personally aware of the experience of the Grievant and how it relates to their needs. To assure that unprejudiced consideration is given this particular Grievant, an unbiased committee acceptable to the Grievant should be appointed to make its recommendations to the

M A I L I N G C E R T I F I C A T E

I certify that a true and exact copy of the foregoing STEP 5 DECISION has been mailed to the following: Billie J. McConnell, Grievant, at UDOT District #5 Office, P. O. Box 1009, Cedar City, Utah 84720; Ken Wilkes, Employee Relations Representative, Utah Public Employees' Association, 1000 Bellwood Lane, Murray, Utah 84123-4494, grievant's representative; and from the Utah Department of Transportation: Eugene H. Findlay, Executive Director; Gene Sturzenegger, Deputy Director; Grant S. Fairbanks, Personnel Manager; and Stephen Noble, District #5 Director; Blaine C. Palmer, Director, and Felix McGowan and Marvin Johnson, Bureau Managers, each with the Division of Personnel Management.

D A T E D this 14th day of OCTOBER, 1987.



DONA HILLMAN
Secretary

McConnell v. Utah Department of Transportation,
3 PRB 26, Decision (April 15, 1988)

BEFORE THE PERSONNEL REVIEW BOARD OF THE STATE OF UTAH

APR 29 1988

CLERK OF COURT
200 STATE CAPITAL

In the Matter of the Appeal of:	:	
 BILLIE J. McCONNELL,	:	 D E C I S I O N
Grievant and Respondent	:	
	:	
v.	:	
	:	
UTAH DEPARTMENT OF	:	
TRANSPORTATION,	:	
Respondent and Appellant	:	
	:	Case No. 3 PRE 26

Oral argument for the above-entitled matter was heard on March 15, 1988, pursuant to notice, in the Governor's Board Room, State Capitol Building, Salt Lake City, Utah. The following Personnel Review Board ("the Board") members were present: Chairman Bruce T. Jones, Jean M. Bishop, David M. Hilbig and Kathleen Hirabayashi. Absent: Jose L. Trujillo.

The Utah Department of Transportation ("UDOT" and "the Agency") was represented by Assistant Attorney General Neal T. Gooch. UDOT personnel manager Grant S. Fairbanks was also present as was Blaine C. Palmer, Director, Division of Personnel Management ("DPM"). L. Zane Gill, Attorney at Law, represented Billie J. McConnell on behalf of the Utah Public Employees' Association. Mr. McConnell ("the Grievant") was present.

A certified court reporter made a verbatim record of the appellate proceeding before the Board, which has not been transcribed to date. However, the evidentiary/Step 5 proceeding had previously been transcribed into two volumes. Volume I consists of the evidentiary proceeding conducted before

In February 1987 Grievant sat for the UDOT Engineering Qualification Exam ("E.Q.E.") and received notice of his passing score in April 1987.

On May 18, 1987 UDOT announced an opening for either an Engineering Associate III or a Civil Engineer III position to be located at the Agency's District #5 headquarters in Cedar City. This announcement originated in UDOT's Blue Bulletin No. 18. On May 20, 1987 Mr. McConnell formally applied for the Engineering Associate III position, which had a grade 27 salary range.

On June 15, 1987 Alfredo Le Blanc, a Personnel Analyst for UDOT, notified Grievant by letter that he (Mr. McConnell) did not meet minimum qualifications, and thus could not be considered for the position of Engineering Associate III position for which he had applied. Under date of June 26, 1987 Mr. McConnell filed a grievance which was denied at the department head level (Step 4). Grievant then advanced his complaint to the evidentiary/Step 5 level which was conducted on the dates noted above. The hearing officer adjudicated in favor of the Grievant. The Step 5 ruling stated:

Decision:

1. The Grievant was not given proper consideration in meeting minimum requirements for an Engineering Associate III position.
2. The UDOT violated its personnel rules by failing to consider the Grievant qualified for the Engineering Associate III position.

Remedy:

The appropriate appointing authority should consider, without prejudice, the Grievant along with all other qualified applicants at the time of the closing of the Engineer Associate III announcement. Substantial consideration must be given to the recommendations of District #5 administrators who are personally aware of the experience of the Grievant and how it relates to their needs. To assure that unprejudiced consideration is given this particular Grievant, an unbiased committee acceptable to the Grievant should be appointed to make its recommendations to the UDOT Personnel Manager. This is not intended

and correct based upon the adduced facts. After reviewing the record, the Board finds no reversible error in the hearing officer's Findings of Fact, nor in his Conclusions of Law. The Step 5 Decision and remedy are affirmed; additionally, the Board submits a few findings and conclusions hereinafter.

III.

FINDINGS:

Grievant's counsel has incorporated the hearing officer's Findings of Facts ("Step 5 Findings") into his brief. The Agency's counsel has not objected to specific findings in his brief or in his oral argument. Rather, the latter has based the Agency's appeal upon three separate Step 5 Conclusions of Law, which he holds to be in error. Thus, noting little if any dispute over the Step 5 Findings, the Board accepts those findings and adopts them as part of this decision. Moreover, the Board sets forth the following findings:

1. In order for Mr. McConnell to qualify under the education and experience criteria of either the October 16, 1985 or the January 1, 1987 Engineering Associate III class specification ("class spec"), he had to apply the substitution provision under No. 2 because he lacked the requirement of graduation from an accredited four-year college or university with a major study in either civil engineering or a closely related (professional) field.

2. The October 16, 1985 class spec for Engineering Associate III offered the following year-for-year substitution for education and experience:

Satisfactory completion of the UDOT Engineer Qualification Examination plus eight (8) years experience in a related field or an equivalent combination of education and progressively responsible full-time paid employment in a closely related field. (Exh. G-4.)

4. Prior to January 1, 1987 the practice of UDOT in the subject class spec was to accept "progressively responsible full-time paid employment in a closely related field" prior to successful completion of the E.Q.E.

11. The education and experience requirements set forth on UDOT's Blue Bulletin No. 18 differed considerably both from those stated in the January 1, 1987 class spec and from those in the 1985 class spec.

12. None of the staff in DPM was aware of UDOT's new interpretation, pursuant to the January 1, 1987 class spec, when DPM staff were initially requested to review the Grievant's qualifications and to compare them with the appropriate class spec. (Step 5 Findings Nos. 20, 21, 26, 29; T. Vol. I, pp. 122, 124, 126, 130.)

13. Some UDOT middle-managers and district officers were not cognizant of UDOT's new interpretation of the January 1, 1987 class spec until the controversy over McConnell's application arose. (Step 5 Findings Nos. 27, 28, 29; T. Vol. I, pp. 33, 38-39, 50, 52, 71, 74.)

14. UDOT policy 05-142 states in part:

A passing score on this examination [E.Q.E.] does not guarantee promotion to engineering status but will establish an individual's eligibility for engineering positions as they become available.
(Emphasis added.)

A plain reading of the above-quoted provision would lead a reasonable person to conclude that successfully passing the E.Q.E. would establish a person's eligibility for engineering positions. The Agency's 1987 interpretation of the subject class spec would appear to be in conflict -- if not a contradiction -- with the above-cited policy.

15. There is no obligation by a State agency to further define a class spec issued by DPM with a new interpretation; but if an agency chooses to do so, then the burden is on that agency to be consistent with DPM's interpretation. Thus, agencies have some measure of discretion and latitude to interpret the class specs differently from DPM, but if agencies choose to interpret them differently then the burden is on those agencies, such as UDOT, to show consistency and clarity, but absent on abuse of discretion. Even so, appeals from an agency's distinguishing interpretation may be taken to this Board, if not previously rectified by DPM.

the required number of years of experience prior to passing the E.Q.E. In support thereof, Grievant offers the October 16, 1985 class spec which even the Agency concedes was interpreted as Mr. McConnell says it was with respect to UDOT accepting the past years of related job experience prior to the E.Q.E. Although the required number of years and the wording of the job experience criterion differed considerably (i.e., the 1985 class spec said "eight (8) years [sic] experience in a related field or an equivalent combination of education and progressively responsible full-time paid employment in a closely related field"), the chief dispute lies in the Agency's interpreting the January 1987 class spec as requiring the necessary experience after -- not before -- successful completion of the E.Q.E. in distinct contrast to the previous practice. Grievant points to the example of UDOT employee Bruce Swenson who was promoted shortly after passing the E.Q.E. in 1985 (T. Vol. I, p.p. 80, 84, 115-116.) Swenson was promoted to Engineering Associate III after having passed the E.Q.E. Yet, Swenson was not required to gain his related experience after the exam, as in the situation of McConnell. The Swenson example appears to typify the Agency's former practice of having accepted experience prior to the E.Q.E., which practice apparently existed for some years prior to 1987.

B. Lack of Notice.

The disturbing as well as critical factor is that UDOT did not put its employees on notice that a substantially new interpretation was being implemented with the 1987 class spec. Thus, although UDOT had changed its interpretation so that years of experience now had to be accrued after passing the E.Q.E., affected employees/applicants were not given any notification as to UDOT's new interpretation; in reality, UDOT had neither a written definition nor a written interpretation of the new position being taken in regard to the Engineering Associate III class spec. An after-the-fact verbal interpretative change is not congruent, harmonious or consistent with merit system principles. The hearing officer was on point when he observed in Conclusion No. 3 (quoted in pertinent part):

There is nothing in the published job specifications of January 1, 1987 which supports

C. McConnell's Qualifications.

Turning to the situation of McConnell, we note that several officials in District #5, including the district director, as well as other officials elsewhere in UDOT, found McConnell qualified for the promotion. (T. Vol. I, pp. 37-38, 46, 49, 50, 60-61, 70, 72.) Such testimony by peers and superiors constitutes credible substantial evidence. However, authorized personnel analysts and experts are the final determiners over interpreting State and agencies' personnel rules and policies. Albeit in the instant case, even DPM analysts and the director of DPM initially evaluated McConnell's job experience as meeting the class spec's requirement. DPM rule 7.d.(2)((f) requires a candidate for promotion to meet "the minimum qualifications specified in the class specification." As the Agency acknowledged, McConnell met the requirements for education and experience in the 1985 class spec, which included his length of service as an engineering technician at the highest level (grade 21) and he met the "closely related field" criterion. (Step 5 Finding No. 10; Conclusion No. 11.)

When the Agency decided to change its standing interpretation of required experience from the 1985 interpretation to the new (1987) interpretation, that interpretative change should have been communicated to prospective applicants for the subject position. UDOT's failure to have communicated such an all-important new unilateral interpretation of the required years of experience constituted an abuse of discretion. Certainly that communication could have been a clearly worded statement in the promulgated Blue Bulletin, among other possible forms of communications. More than a few UDOT officials were taken by surprise regarding the new class spec's previously undisclosed interpretation. As to an agency management's right to change an existing interpretation of class specs, the reader is referred to the Board's Conclusions Nos. 3 and 4 above, p. 8. This decision should not be viewed as so restrictive as to require DPM's approval on every agency-issued job announcement. Rather only if that agency wants to offer or rely upon some new interpretation, which is recognizably different from DPM's, would that agency then defer to DPM for approval of its newly-devised interpretation.

VI.

DECISION:

The hearing officer's Step 5 decision and remedy is affirmed.

DECISION UNANIMOUS

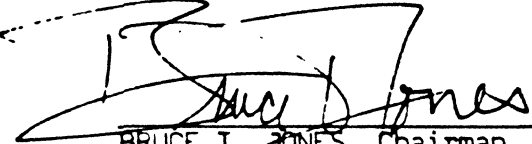
Bruce T. Jones, Chairman

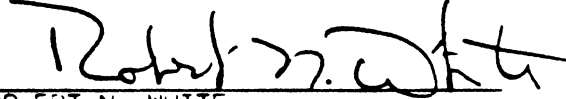
Jean M. Bishop, Member

David M. Hilbig, Member

Kathleen Hirabayashi, Member

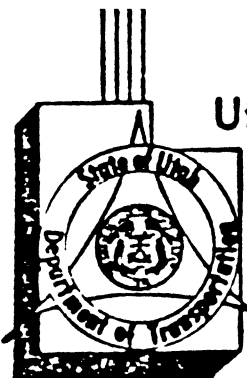
D A T E D this 15 day of APRIL, 1988.


BRUCE T. JONES, Chairman
Utah Personnel Review Board


ROBERT N. WHITE
Administrator/Executive Secretary
Utah Personnel Review Board

Any appeal from the Board's decision must be made within 20 calendar days from issuance of this decision to the Utah Court of Appeals. On appeal to the Utah Court of Appeals, the Board's findings of fact, if supported by substantial evidence, shall be conclusive. Utah Code Ann. 1953, as amended, Section 63-46b-16.

UDOT POLICY No. 05-142



Utah Department of Transportation

Policy
apply does not do
away with
experience
req.

UDOT ENGINEERING QUALIFICATION EXAMINATION

POLICY: The Engineering Qualification Examination will be administered to individuals who meet the minimum qualification standards established by the Training, and Development Unit.

no mention
of min req
to 6 min
req.

SCOPE: In order to be eligible for engineering status within the UDOT by taking the UDOT Examination, the candidate will have to receive a passing score on the examination. Grading of the examination will be under the direction of the Training, Testing and Development Unit.

The administration of the examination will be conducted during the month of February each year at a location selected by the Training, Testing and Development Unit. An examinee who receives a minimum of 40% on the examination will be eligible to take the examination the following year. If the examinee does not receive the minimum grade they will be required to sit out for one year.

The names of the individuals passing the written examination will be recorded on an engineering register maintained in the UDOT Personnel Section.

These examinations are on an equal opportunity basis without discrimination as to race, religion, color, sex, age, national origin, or handicap.

DX

A passing score on this examination does not guarantee promotion to engineering status but will establish an individual's eligibility for engineer positions as they become available.